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University of Pennsylvania

SERIES IN
Political Economy and Public Law

NO. 15

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AN INVESTIGATION OF
RAILWAY TRAFFIC ASSOCIATIONS AND A
DISCUSSION OF THE DEGREE AND FORM OF CO-OPERATION
THAT SHOULD BE GRANTED COMPETING
RAILWAYS IN THE UNITED STATES

BY
CHARLES S. LANGSTROTH
AND
WILSON STILZ

WITH AN
INTRODUCTION
BY
MARTIN A. KNAPP
Chairman of the Interstate Commerce Commission

Published for the University
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PREFACE.

The two essays constituting this monograph on Railway Co-operation were written in competition for a prize open annually to a limited number of students in the senior class of the Wharton School of Finance and Economy of the University of Pennsylvania. This prize was established in 1896 by Mr. Henry C. Terry, of Philadelphia, in honor of his son, Willis Terry, who died suddenly two months after graduating from the Wharton School.

The second set of essays submitted in competition for the Willis Terry Prize were prepared under my supervision during the academic year 1897–1898. The subject which the five competitors investigated and wrote upon was given to them ten months before the essays were submitted in final form for examination. The five essays were all prepared with care; but two of the contestants, Mr. Charles S. Langstroth and Mr. Wilson Stilz, gave a large amount of time and research to the preparation of their essays, and when the judges came to pass on the merits of the manuscripts, it was agreed by the judges, not only that the essays by these two young men were the best of the five, but that the studies were of such exceptional value as to make it desirable for the University of Pennsylvania to include them among its publications.

In making their award, the judges gave the prize to Mr. Langstroth and made honorable mention of Mr. Stilz's essay. They recommended that both papers be published, not only because each possessed a high order of merit, but also for the reason that the two authors had treated the subject differently and in such a manner that the two essays complemented

each other in a large degree. Although not one of the judges, I fully agreed with them. The two essays taken together constitute what seems to me to be a most useful contribution to the literature dealing with the railway question.

In submitting the subject of the essays to the contestants, I accompanied the statement of the subject with the following explanatory remarks:

"The essay is to be a concrete study of the practical question of the co-operation of the railways in the United States at the present time. Present and former traffic associations will require investigation, not for the purpose of setting forth the details of their history, but for the purpose of depicting the economic and social forces that account for the efforts of the railways to promote co-operation and of the public to maintain complete competition. The past and present agreements of traffic associations, the legislation of the States and of the United States, and the more important judicial decisions affecting railway associations constitute the chief materials to be used in the preparation of the essay, which is to deal, first, with the interpretation of these materials, and, second, with a discussion of the present, practical, economic and political question—the extent and form of railway co-operation which, in the light of our past experience, should be granted to competing railways."

The authors carried on the investigation thus outlined each in his own way; and, although they consulted with me frequently, the work in the strictest sense of the term is their own. As counselor and critic, I took pains to give each contestant the fullest intellectual freedom. The literary work of the two authors whose essays are printed in this monograph was such that but few changes in style were required. Both essays were accompanied by a bibliography, but as the two bibliographies did not differ very greatly, only one, that prepared by Mr. Langstroth, has been printed.

The views held by Mr. Langstroth and Mr. Stilz on railway questions, as well as those entertained by myself and all other students of those problems, have been largely influenced by the work and reports of the Interstate Commerce Commission. The writings of the present chairman of the commission, the Honorable Martin A. Knapp, hold a high place in transportation literature, and it is a source of especial pleasure to the authors of this monograph and to myself that he has prepared an introduction to this study. He has set forth the relation of these essays to a treatment of the general subject of railway transportation, and has outlined the principles of governmental regulation of railroads in such a manner as to add very much to the value of this publication.

EMORY R. JOHNSON.

August, 1899.

INTRODUCTION.

And no doubt, when the whole subject is carefully examined and wisely considered, it will be found that the true interests of the owners of railroad property may be made to perfectly harmonize with the true interests of the public, and that it will be as wise for the state to encourage and protect whatever in corporate arrangements is of beneficial tendency as it will to suppress what is mischievous.—THOMAS M. COOLEY.

This was the utterance fifteen years ago of an eminent jurist and thoughtful student of railroad transportation. The forecast thus expressed embodies a weighty truth which is rapidly gaining recognition and will ultimately come to full acceptance. Contrasted with actual conditions, however, it seems in one aspect an impracticable view, while in another it suggests the magnitude and complexity of the railway problem. How to secure from carriers by rail the most efficient and most equitable service at the lowest reasonable cost; how to promote the development and increase the usefulness of these agencies of commerce, and at the same time hold them in such control as to prevent the abuse of corporate power; how to combine their facilities to the ends of highest utility without incurring the risk that public rights will be impaired or public welfare imperiled; how to harmonize conflicting interests of such vast proportions and place the people and the railways on a plane of equal advantage and protection, are questions of such grave import as to test the wisdom of statesmanship and tax the resources of public authority.

It cannot be doubted that the solution of these questions will be greatly aided by an intelligent use of experience. While they are presented in many phases and frequently modi-

fied by new conditions, the careful study of what has already occurred must prove of unquestioned value. For this reason it is highly important that the facts of transportation history should be known and their significance understood not only by those who own and manage our railway properties, and are primarily responsible for their operation, but quite as much by the masses of people whose interests are directly involved and who have the power to determine the nature and extent of control to which public carriers shall be subjected.

While the railroads of the country have been of incalculable benefit, the chief agency of our wonderful growth and prosperity, their construction and management as private enterprises have brought about more or less friction and conflict with those who are dependent upon their services. This happens so frequently that in popular estimation there is an almost continuous controversy between the public on the one side and the carriers on the other. Both parties have been influenced by a desire to bring their differences to a fair adjustment, and each of them has tried in its own way, though without much assistance from the other, to reach a satisfactory settlement.

On the part of the public the contest has been mainly carried on by means of legislation. The law-making power has been constantly resorted to for relief from real and protection against imaginary evils, and to force from the roads by statutory enactments compliance with popular demands. Scores of measures for controlling the methods and charges of railway carriers have been passed, many of which were well considered and useful, though not a few were distinctly unwise and mischievous. At the outset some effort seems to have been made to provide restraints by means of charter provisions, which were modeled after those granted to canal and turnpike companies, but this method of furnishing safeguards against corporate wrong-doing was an undoubted failure. At best it was only a preventive remedy, which was tried in a few

cases and found of no value. The doctrine of non-interference by the government was stoutly maintained during this period, and most of the States appear for a time to have abandoned all efforts to impose exceptional or restrictive laws upon railway carriers.

The two feverish decades that followed the civil war were characterized by prodigious activity in railroad building. Excessive and premature construction was encouraged by popular demand or found its incentive in visionary expectations. In the eager haste to secure railroad facilities an unwarranted premium was offered to those who would furnish them. Enormous grants of public lands, donations of private property and endless obligations in the form of county, town and municipal bonds were freely and often inconsiderately given to aid the extension of roads into remote and undeveloped regions. Schemes of crazy speculation often resulted in capitalization unwarranted by cost or earnings, while the temptations of financial necessity furnished excuse for dishonest management. The opportunity to engage in the business of railroad transportation was almost unlimited, because under state laws the formation of railway corporations was easily effected and the restraints to which they were subjected meager and ineffectual. The inevitable outcome of this prolific creation of carriers was a brood of railroad evils, arising from reckless financiering and the intense competition of rival lines.

About 1870 attempts at regulation were made in several of the States, and although only partial success was attained, much of permanent value was accomplished. It was speedily seen, however, that State legislation is inadequate. It is influenced by the circumstances and prejudices of locality, and is therefore variable in its aims and unequal in its requirements. So far as it undertakes to control railroad operations, it is liable to be so feeble and inefficient as to be practically without benefit, or it may be so vexatious and burdensome as to be

plainly oppressive. While the laws relating to property may be dissimilar and conflicting in different sections without serious injury, the laws relating to transportation need to be uniform, or at least harmonious, in all the territory under a common government.

Prior to 1887 Congress had made no comprehensive effort to regulate commerce "among the several States." Its constitutional power in this direction had never been exerted and consequently never tested. The railroads had already absorbed a large portion of the international carrying trade, and were prosecuting their operations regardless of State boundaries and restrained only by the lax and insufficient provisions of the local statutes under which they were organized. Under this system, or want of system, which characterized the history of railway legislation up to a recent period, abuses arose which the States were powerless to correct, and which assumed such startling proportions that the interference of the national government was vehemently demanded. This demand was fortified by a decision of the United States Supreme Court, in 1886, to the effect that a State has power to regulate rates only on such traffic as does not pass its boundaries, thus confining State authority within narrower limits than its exercise had been attempted. The agitation which had already aroused public sentiment culminated in the passage of the Act to Regulate Commerce, approved February 4, 1887, and thus was inaugurated a scheme of federal regulation.

It is not the province of these introductory paragraphs to review the results thus far attained by State or national efforts to control the business of railway carriers; nor was that the principal purpose of the writers of the two essays contained in the following pages. Although it was only incidental to the development of their main topic, nevertheless Mr. Langstroth and Mr. Stilz have set forth these results with such clearness and accuracy that their productions will be found

of great value to the student of public regulation. Under the title of Railway Co-operation these essays are primarily a study of the attempts of railway companies, through voluntary action induced by self-interest, to deal with the difficulties of unrestrained competition. Those difficulties were not seriously felt in the early history of railroad operations. The lines first constructed were mostly of limited extent and their business largely confined to traffic originating in the several sections where they were located. The opportunity for combination seems for some time not to have been appreciated, while the aggregation of capital and unification of control were generally regarded with distrust and hindered by opposition. Gradually, however, the union of connecting lines was effected until finally there came into existence the great railway systems with which we are familiar. The objections to consolidation of this character have mainly disappeared, for the predicted evils have not been experienced and the benefits to the public are everywhere recognized.

Although the relations of the roads have been gradually changed by this process of development, the resulting competition between systems has correspondingly grown in force and intensity. The conditions are different, but the difficulties have greatly increased. For many years railway managers have tried to maintain harmonious relations with each other and thereby avoid the losses and demoralization of interline warfare, Yet during all this period the public opposition to rate agreements, division of competitive traffic and other arrangements of similar character has been constant and decided. The cause of this opposition can be understood only when our railway history is viewed in connection with the social and economic development of the United States during the last half century. In dealing with this complex situation it is necessary to test the various measures adopted by their effects upon the service and the relations of that service to the public; and the student of railway questions

should examine the results of efforts put forth from time to time by railroad managers and by the public, as different aspects of the difficulty have been viewed from their respective stand-points. The writers of this volume have been highly successful in co-ordinating the events of railway history with other social and economic activities, and by so doing have contributed to a better understanding of both. Regarded simply as a historical and critical review of the leading incidents in railroad development, these essays combine the merits of a work of reference and a philosophical treatise upon the subject.

The concluding sections of each monograph are devoted to a consideration of "the extent and form of railway co-operation which, in the light of our past experience, should be granted to competing railways." This, after all, is the vital point of the whole discussion. How can the benefits of associated action be made available without incurring dangers from the concentration of corporate powers? If this far-reaching inquiry can receive a satisfactory answer the difficulties of regulation will be largely removed. So far as railway experience can guide to correct solution, it will be found epitomized in the history of the various traffic associations through which railroad managers have endeavored to put some effective restraint upon rate competition. The papers contained in this volume exhibit the most thorough and exhaustive study that has yet been made of these organizations; and it is specially interesting to note that both writers, examining the question in the light of past events and with reference to public advantage, have reached the conclusion that co-operation by rival carriers should be sanctioned by law.

This conclusion accords with the views of those who have bestowed the most intelligent reflection upon the subject of railway regulation. In the last analysis it is seen that all measures of legislation are designed to the one end of securing at all times and to all persons just and equitable charges for

public transportation. To attain this result and secure its consequent advantages, the railroads of the country should be regarded in their entirety and treated so far as possible as a single system for all the purposes of legal regulation. Practically there is no such thing as an independent or isolated railway. There are many members, yet but one body. Between the different parts of this complex organism there is such relationship and mutual dependence that whatever affects one must in greater or less degree affect the others also and the public interest as well. Whatever, therefore, tends to harmonize action between different lines, whether connecting or competing, whatever operates to bring the railway service into more uniform and systematic operation should be promoted and encouraged by suitable enactments and appropriate administration.

Nor will any just theory of legislation proceed upon the assumption that the public alone are in need of protection and that the railroads can take care of themselves. Such a view is unfair and illogical. The shipper is entitled to have his property transported at a reasonable price, the carrier equally entitled to reasonable compensation for performing the service. The collision of pecuniary motives by which both parties are influenced gives rise to the controversy over rates and charges. This conflict is incessant and sometimes extremely severe. But the shipper is not always worsted in the encounter. He is quite often the successful contestant. The necessity of the carrier is often the opportunity which the shipper unscrupulously turns to his own profit. Odious extortions have been practiced by railway managers; shippers likewise have been unreasonable and dishonest. The public service in which the carrier engages is undertaken for private gain. The shipper avails himself of this public service, likewise for private gain. The selfishness of human nature is on both sides of the transaction. Now, the object of legal regulation is to hold these opposing forces in stable equilibrium, to

reduce contests and complaints to a minimum, and to bring the dealings between the railways and their patrons under the control of mutual justice. The sufficient scheme of legislation, therefore, will recognize the possibility of wrong-doing on one side as well as the other; it will be judicial rather than partisan in its aims and requirements, and while equipping the shipper with ample protection will also furnish the carrier with all needful defenses. This is true not only as to rates on competitive traffic, but also as to relative rates between competing centres of trade. So far as the law can provide remedies for grievances which grow out of these conditions, those remedies should be available both to the carrier and the public. Reasonable charges to the one and reasonable remuneration to the other are alike involved in any just idea of regulation; and laws which realize that idea in practical results will conserve the rights of the railways to the full extent consistent with the rights of the people.

These beneficent ends cannot be reached without conferring upon railroad corporations privileges of association and rights of contract with each other which are denied by existing laws. The facts of experience and familiar knowledge demonstrate the error and inconsistency of a legislative policy which makes rate competition compulsory and at the same time condemns, as criminal misdemeanors, the methods and inducements by which in all other spheres of activity competition is mainly effected. The time has come for combining the facilities and unifying the operations of railway carriers that they may better meet the demand for stable rates, equal treatment and cheaper transportation. We must surely believe that the government of the United States has the strength, the courage and the sagacity to permit this indispensable service to be performed by friendly association, and at the same time provide ample safeguards against the dangers of railway federation.

These theories of legislation find much support in the thoughtful essays of Messrs. Langstroth and Stilz. They are a valuable contribution to railway literature and will be read with interest and profit by all who desire accurate knowledge of railway history and correct views of railway regulation.

MARTIN A. KNAPP.

Washington, D. C., August 3, 1899.

Railroad Co-operation in the United States.

BY

CHARLES S. LANGSTROTH.

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CHAPTER I.

Co-operation of Connecting Railroads.

The earliest combinations of railroads in the United States were those made by several lines jointly engaged in the carriage of through traffic. This form of combination was merely a consolidation of different links into one connecting line, in order to secure the benefits of unified management.

The railroads in this country were at first of a purely local character; their traffic originated and ended at places on the same road. Very often the railroads were regarded merely as feeders for the canals. With the development of a large through traffic, however, a system of transportation which required frequent transhipments of the goods naturally involved great waste. The shipping public also suffered, since, each link in the chain being under a separate management, it was difficult if not impossible to determine responsibility for loss or damage.

The actual condition of affairs under such a system has been described by Edwin D. Worcester, secretary of the New York Central, in his testimony before the Senate Committee on Transportation Routes to the Seaboard. The description applies to the conditions which existed before the consolidation which took place in 1851 and 1853:

"We had ten roads between Albany and Buffalo. There was just about as much efficiency in operating ten roads as there would be in ten men trying to do a thing that one ought to do. Every board of directors had its own profit to make and its own schemes to advance. There was no obligation on the part of any one company to do anything for any other. Through lines of cars could be run only by very complicated and embarrassing arrangements. I can remember the time when conductors were changed at the end of each one of the

roads of the old line between Buffalo and Albany. In some cases a ticket could not be bought through from Albany to Buffalo. The elements of usefulness and economy were very few. In regard to freight, there was no obligation on the part of any one of the roads to take a single pound of it from another. Except as far as they might agree with each other, it involved changing at each terminus."[1]

Consolidation.—It was to overcome this state of affairs that the railroads entered into their earliest combinations. Consolidation had been begun in some sections before 1860, but in general it was not until well along in the seventies that any considerable number of the roads had given up their independence.

The Pennsylvania engaged more extensively in such operations than any other company. With an original line of 249 miles, by 1869 this company had secured, through purchase and leases, and by construction of certain connecting links, a line of 2,458 miles. The New York Central forms another good example of the growth by consolidation during this period. It was formed in 1853, of what had been originally eleven railroads. Within five years five more lines had been added, and in 1869 there was under one general management a line of more than 4,000 miles long. During this same period were developed in a manner nearly similar the other trunk line systems—the Erie and the Baltimore & Ohio. In the West the great railway systems have grown and consolidated even more rapidly than in the East.

There has been not a little public apprehension in regard to the growth of these enormous companies, with the concentration of such great power in the hands of a few men. If great power has been placed in the hands of a few, however, at least one of its uses has been to promote public interests. Facilities for cheap, rapid and convenient movement of passengers and freight between distant points have been improved,

[1] Windom Report, 1874, Evidence, p. 157.

delays and changes of cars have been avoided, and the responsibility of the carriers has been increased, to an extent that without consolidation would have been impossible.

In 1873, the Massachusetts Railroad Commissioners said of consolidation, "not only have the evils anticipated not resulted, but it would seem that the public has invariably been better and more economically served by the consolidated than by the independent companies. The larger companies employ abler officers, and seem to be managed more on the system of great departments of commerce and less on that of lines of stage coaches. There is, in fact, far less of friction in the work of transportation and far more of a system. Finally, as regards the community at large, it is found that large companies can be held to a closer responsibility than small ones."[1]

In 1874, the Windom Committee expressed itself in favor of the consolidation of separate links into through chains, on the ground both of economy and of increased and centralized responsibility.[2]

Fast Freight Lines.—Forms of combination other than actual consolidation have been entered into by connecting railroads to secure the advantages of unified management. For the purpose of handling the traffic with which several roads were concerned, entirely distinct organizations were established; these "fast freight lines," as they were called, owned the cars used for through traffic and assumed the necessary responsibility. They collected the charges from the shippers and paid the railroads certain specified tolls for motive power and use of road-bed. The most serious abuse connected with the system was that the officers of the railroads were also interested in the freight line and would consequently give it exceptional advantages.

This evil was obviated by the establishment of the co-oper-

[1] Report, p. 138.

[2] Transportation Routes to the Seaboard, p. 138.

ative fast freight lines. These were neither separate organizations nor partnerships; they were simply car clearing-houses, whose main duties were to keep the accounts of the traffic in which several roads were concerned and to adjust balances.[1] Their plan of operation was this: the through traffic was hauled in the cars of any of the roads forming the line, the company owning the car received a certain mileage for its use (say three-fourth cents per mile run);[2] and the remainder of the receipts was divided up among the roads in proportion to the distance each had hauled the freight. Collections and disbursements were made by the line, but only as agent for the different roads. It accordingly had no income of its own and was supported by assessments on the different roads. As Hadley says, "It cannot be made a means of fraud, any more than a clearing house can be made a means of fraud. The sum of debit balances for one set of roads must equal the sum of the credit balances for the rest, leaving the line itself neither the gainer nor the loser."[3]

A typical example of the saving resulting from this system is shown in the experience of the New York and Erie. By simply changing from the old form of handling through shipments to the co-operative form, the expense of looking after through freight was reduced by this road from 9 per cent of the earnings on such freight to 3 per cent.[4]

The service performed by the two kinds of fast freight lines can hardly be overestimated. Without their aid only a very small proportion of the through rail freight movements would have been possible. They have been the main factor in bringing about the abolition of the practice of transferring

[1] Hepburn Committee Report, p. 8; testimony, p. 2963.

[2] Varying according to the condition of the track—largest in the South, smallest on the trunk lines. (Hadley "Railroad Transportation," p. 88.)

[3] "Railroad Transportation," p. 89.

[4] Report on Transportation Routes to the Seaboard, testimony. (Blanchard) p. 364.

freight from one set of cars to another at the connecting point between two lines, and in avoiding the many delays and expenses otherwise attached to long through shipments.[1]

Stimulus to Competition.—The result of the cheapening of through rail traffic by means of consolidation and of fast freight lines, has been to increase the opportunities for competition and to strengthen its intensity.[2] Without the aid of these factors a large part of the through traffic would never have gone by rail, and the amount shipped under the old extravagant conditions of transhipment would have been insignificant as compared with the volume of existing traffic. The ability of the railroads to haul a commodity a long distance without consuming its value, led, however, to the increase of competitive traffic, to secure which the railways were willing to make strenuous efforts.

[1] Ringwalt: Transportation Systems in the United States, p. 193.

[2] Windom Report, p. 138.

CHAPTER II.

CO-OPERATION OF COMPETING RAILROADS.

(1) Economic and Social Forces Accounting for Such Co-operation.

Railroad Problem Due to Competition.—The motives that have led connecting roads to combine have been of a much less complicated nature than those that have actuated the co-operation of competing lines. The average railroad man regards competition as being responsible for nine-tenths of the evils of our railway system. To overcome these evils has been the chief motive leading to such combinations.

From the establishment of our railway system, transportation has been looked upon as being regulated by the natural safety-valve of competition. The earliest roads were constructed with the belief that they were merely improved highways, that every one would be at liberty to run his own wagons or cars upon them by the payment of a certain toll to the company, and that the only artificial regulation needed was to prescribe maximum rates of tolls. Although this idea of improved highways was soon abandoned, and the maximum rates either abolished or antiquated, the belief in the power of competition remained unshaken. Competition was relied upon as the natural regulator of this and all other industries, and it is to the failure of competition to perform its part that we owe our railroad problem.

Charles F. Adams says,[1] "As events have developed themselves, it has become apparent that the recognized laws of trade operate but imperfectly at best in regulating the use made of these modern thoroughfares by those who thus both own and monopolize them;" and he defines the railway problem as the question of finding some other means of making good

[1] "Railroads," p. 81.

the deficiencies thus revealed in the working of the natural laws.

The unsatisfactory results of competition in regulating the railways of our country—and the numerous evils developed under it—may be attributed to certain inherent qualities of the transportation industry. These qualities, which seem to be peculiar to the railroad industry, may be considered as three in number:

1. Excessive competition, resulting from the oversupply of transportation facilities and the permanent character of the railroad when once constructed.
2. Slightness of the relation between the amount of service and the cost of each unit of service performed.
3. Partial application of competition, which exerts an influence on only a portion of any road's traffic.

Excessive Competition Leads to Rate Wars.—The intensity of the struggle between competing railroads arises from the existence of an oversupply of transportation facilities caused either by ignorance of the conditions of trade or by the profit to be made in mere construction. The influence exerted by an oversupply of facilities has not been so important a factor in the other industries as in the railway, for two reasons: the motives have not existed generally that cause such an oversupply; and where an oversupply does occur its influence is not so powerful because of the more temporary character of the industry.

In an ordinary industry, competition so works out that when, for any reason, an oversupply of facilities exists—when more products are being made than there is a demand for—the price of the product will fall, the producers carrying on business at the greatest disadvantage will be forced out, and production will be curtailed. But when a railroad is once established, it is established for good and all; rather than shut down, a road will continue to run if its revenues pay running expenses and leave *anything at all* to pay for running it.

The history of the railroad's development in the United States so abounds with examples of desperate competition for traffic that it is hardly necessary to cite any special instances. The point to which a railroad rate will fall during a "rate war" is fixed by the actual cost of each particular operation. During a rate war, a railroad cannot attempt to make each part of the traffic pay its share of the fixed expenses; a manager is satisfied if he can make anything over actual operating expenses. This accounts for the desperate character of such wars as those between the trunk lines from 1869 to 1878, when rates fluctuated from 82 cents to 10 cents.[1]

The violent reductions in rates during rate wars result in great evil to the business public, who depend upon stability of trade conditions, and to the railroads, whose revenue from competitive traffic is often practically annihilated.

To sum up in a few words the first class of competitive conditions which we have found to apply with peculiar strength to the railway, they are: that powerful influences have caused the creation of an oversupply of transportation facilities; that the consequent results have been more pronounced owing to the permanent nature of a railroad once constructed, and that these results in an industry with such a large proportion of fixed capital are violent strife and fluctuating rates.

Personal Discriminations.—The roads have made every effort to avoid such strife by adhering to a sort of tacit agreement as to the rates charged. Of course it is desirable for the roads to keep up rates to a paying level, but then it is still more desirable for one road to ask just a little below the rate charged by its rivals. This brings us to the second great evil caused by competition—the special rate given to individual shippers. The temptation to give a discriminating rate does not lie in the fact that the total volume of freight will be increased, but in the fact that each additional unit of freight can be hauled at a proportionately less charge.

[1] Albert Fink, New York, 1884.

In the railroad industry we find a peculiarly slight relation between volume of traffic and the proportionate cost of each unit hauled. While the conditions in most industries are undoubtedly such that an increase in production will not mean a corresponding increase in the total cost, it is nevertheless true that in no other industry is the cost of performing an increased service so low compared with the cost of the previous amount of service, as in the railway.

The consequence of this peculiarity of the railway is the attempt made by the railroad to get the freight of a large shipper by offering him a slight rebate. The shippers themselves often take the initiative in the matter of special rates, working one road off against another. Very often the shippers make the grossest misrepresentations and of course one railroad has no possible opportunity to verify the statements about its rival made by a shipper anxious to secure favorable rates.

Under such conditions the result under unrestricted competition was that special rates were given to those who asked. This was well shown by the Hepburn Committee's report in 1879: "He who goes into a railroad office and barters for a low rate gets it; he who, relying on the equitable treatment which common carriers are bound to give, or not knowing that secret special rates may be had, delivers them his goods and calls for his freight bill, pays a higher rate." [1]

That discriminations existed wherever it was possible for them to exist can hardly be doubted. The Hepburn Committee report is the earliest reliable source of information regarding the prevalence of the practice of granting discriminating rates. The report said: "The charge that the railroads discriminate in favor of certain individuals, as compared with others in the same locality, is fully proven. . . . The committee find, made and in force within the period of one year, a number of special contracts on the New York

[1] Report, p. 66.

Central and the Hudson River Road, estimated by the railroad people at six thousand. The number on the Erie was very much less though the practice of giving them was the same."[1]

The condition in the West was described in the Cullom Committee Report of 1886, where J. W. Midgely says: "While the tariff from Chicago to Kansas City on the first four classes of freight was 90, 70, 50 and 30 cents per hundred pounds respectively, large shippers had contracts at one-half the rates named, while a few secured contracts at even less than half."[2] These two examples are sufficient to show the conditions which resulted from competition; it is hardly necessary to cite any further instances of what is a universally admitted fact.

Such a system of discriminating between individuals violates the fundamental premises of the law of competition and shatters the foundation on which the successful working of that law must rest—that equal opportunity under similar circumstances must be afforded to all. We know what the effect would be if the government were to tax one firm at twice as high a rate as another; and no great depth of economic thinking is required to extend this knowledge to the railroad situation—that the very soul of competition is equality of treatment, and that where this equality does not exist there will be monopoly.

The injurious effects of this abuse of the railroad's power were felt not only by the shipper. It reflected on the railroads themselves—although they created this evil they were one of the greatest sufferers from it. Why they continued a practice from which they were the greatest sufferers, is, as Van Oss says, a mystery; and he draws the following picture of their position: "Like gamblers in a Montana mining camp everybody knew he had to be on his guard against others, yet confidently expected not only to hold his own, but to be 'one

[1] Ibid., p. 48.

[2] Cullom Report—Appendix, p. 226.

too many' for all players, no matter how many cards each might have up his sleeve."[1]

A good summary of the evils of discrimination was made by Haines, a prominent Southern railroad manager, before the Cullom Committee: "This system went on from bad to worse, centring the business of competitive points in fewer hands, drawing the business of neighboring stations to competitive points, and rendering it impracticable for a man with small capital to establish himself in business under such circumstances. . . . The railroad managers no longer controlled their own business. Under the threat of losing business they were forced to make concessions which they knew were wrong. They were annoyed by applications which it was impolitic to refuse, and met with suspicion and treachery from the very men who were being made rich by rebates, and yet feared that some one else might be getting better rates."[2]

Discriminations between Localities.—The third characteristic of the competitive conditions of the railway, which is not present in the conditions of any other industry, is that while part of the traffic of a road may be competitive, very rarely if ever are conditions such that all of the traffic of a road is subject to the competition of another road. In other words, the influences affecting competitive railway rates, largely fail to apply to rates on traffic between places which are served by only one road. The instances of parallel competing roads serving absolutely the same territory are of very rare occurrence. The usual condition is that the through traffic is subject to the competition of two or more roads, while the local traffic of any of the roads is subject only to an indirect competition.

This peculiarity of railroad competition—that its influence extends unequally to different parts of the traffic hauled by any road—that some communities enjoy the benefits of its influence more fully than others do—has been of great

[1] "Amer. Railroads as Investments," p. 33.
[2] Cullom Report, Appendix, p. 132.

importance in the history of the railroad problem, a problem which, as Charles Francis Adams says, arose out of the failure of natural law, or competition, to perform its part.[1]

The effect of a system of transportation which tends to suppress industry at localities having only one railroad, and which unduly encouraged industry at points enjoying direct competition, was very injurious to the individual railroads, since they could safely rely for a profitable return upon only the non-competitive traffic. It has always been the aim of roads to pass through territory in which a large and remunerative local traffic can be developed; but this development is often rendered impossible by the lower rates which manufacturers may obtain at competitive points. The community enjoying competition in railway service was the successful community, and consequently the one which supplied the bulk of the traffic of the railroads. This resulted in great injury to the roads, since it created traffic at non-remunerative points at the cost of destroying traffic at the remunerative non-competitive point. The roads attempted to overcome this evil by equalizing local and through rates, partly by an open adjustment of published rates, but more often by making invidious and injurious personal discriminations.

Agreements to Sustain Rates.

Early History.—The co-operation of railroads to overcome the effects of competition began almost immediately upon the completion of those arrangements which made competition possible. We have seen that it was the co-operation of the connecting lines that rendered possible any large through all-rail shipments of freight, which in turn afforded an opportunity for the force of competition to play its part in determining what proportion of this traffic should be hauled by each of the available roads and what rates should be charged.

[1] For a fuller discussion of the nature of railroad competition, see chapter IV.

What is perhaps the first indication of an attempt on the part of the roads to co-operate in order to hold in check the influence of competition is to be found in the report of the Pennsylvania Railroad Company, dated January 31, 1855. There President J. Edgar Thomson says: "With a view of agreeing upon general principles which should govern railroad companies in competing for the same traffic, and preventing *ruinous competition*, a free interchange of opinions took place during the past year between the officers of the four leading East and West lines,[1] and also with those of their Western connections. The influence of these conferences, it is believed, will be felt in reducing expenses, correcting abuses and adding to the net revenue of the several companies, while the public will be served with equal efficiency and greater safety. Instead of an army of drummers and runners, spread over the country and paid by each company, an agent is now maintained, at the joint expense of the four lines, at all important points in the West, to distribute bills and give unbiased information to the traveler."[2]

The "ruinous competition" spoken of by President Thomson related to classes of business different from those which later furnished the most fertile source of strife. At that time the Eastbound movement of the great Western crops played a very small figure in trunk line traffic; the passenger traffic occupied a much stronger relative position before 1860 than it ever has since. The various trunk lines were making great efforts to become popular routes for travelers. The Pennsylvania acquired connections that enabled it to compete for the passenger travel not only to and from Philadelphia, but also to and from New York and Baltimore. Then, as now, the Baltimore & Ohio prided itself on the opportunity which it was able to afford travelers going to Washington, D. C.[3]

[1] New York Central, Erie, Pennsylvania, and Baltimore & Ohio.
[2] Eighth Annual Report, p. 13.
[3] "Development of Transportation Systems," p. 152.

This agreement seems to have been without much permanent success, for two years later we find the New York Central engaged in a bitter strife with the Erie over the passenger traffic between Lake Erie and New York. This struggle assumed nearly all those exceptionally hostile features which characterized the later wars. As Ringwalt says,[1] "this strife was exceptionally acrimonious and led to a fearful cutting of rates."

This war came to an end with another treaty or agreement signed by the presidents of the four great trunk lines in 1858, which is spoken of as follows in President Thomson's report for that year:

"The effects of the unwise competition for the carrying trade between the East and the West, which prevailed for a time during the past year, induced the officers of the New York Central, Erie, Baltimore & Ohio and Pennsylvania to meet in convention for the purpose of agreeing upon remunerative rates, abolishing injudicious practices, and effecting a harmony of purpose conducive to the mutual advantage of the railway interest and the public. An arrangement was agreed upon which took effect on the first of last October, and the advantages thus far resulting from this compact seem to demonstrate the propriety of its continuance."[2]

According to Ringwalt,[3] this agreement provided that S. M. L. Barlow, then president of the Ohio & Mississippi, should act as umpire in case of a renewal of strife. It also clearly laid down a number of rules which related not only to the passenger traffic but also to the rates to be maintained on various classes of freight traffic, especially the Eastbound movement of live-stock, and the Westbound movement of merchandise forwarded from Boston. It is probable that rate agreements were also in vogue in New England before the War of the

[1] Ibid., p. 133.

[2] Twelfth Annual Report, p. 19.

[3] "Development of Transportation Systems," p. 153.

Rebellion, but their history has not yet been brought to light.

Agreements Between the Trunk Lines.—The history of the attempts of the railroads in the trunk line territory to combine is especially suggestive. The really severe competition between the trunk lines did not arise until 1869, when the New York Central and Pennsylvania had each obtained virtual control of a Chicago connection.[1] The effect which this new competitive force arising from consolidation had upon the rates charged on freight from Chicago to New York was immediate and powerful. In 1868, the rates had been $1.88 per hundred pounds for first-class freight and 82 cents for fourth-class. In the summer of 1869, the rate fell to 25 cents per hundred on all classes. Of course such rates as these could not continue for any great length of time, and as a matter of fact they did not. Rates were soon (in 1870) returned to an at least nominal basis of $1 to $1.50 for first-class and 60 cents to 80 cents for fourth-class.[2]

Excessive competition culminated in the general collapse of 1873. As Charles Francis Adams says,[3] "at that time the unnaturally rapid construction which had been going on for ten years produced its results." The situation was still further unsettled in 1874 by the Baltimore & Ohio's acquisition of a Chicago connection and also by the competition of the Grand Trunk of Canada, which had secured its line connecting Milwaukee and Detroit with the Northern Atlantic ports.[4]

There were now five great trunk lines competing for the East and West bound freight, the Grand Trunk, the New York Central, the Erie, the Pennsylvania and the Baltimore & Ohio. Up to this time agents from the last four of these lines

[1] Hadley, p. 93.

[2] Hadley, p. 93.

[3] Railroads: Their Origin and Problems, p. 148.

[4] Hadley, p. 94.

had been in the habit of meeting at regular intervals and publishing agreed rates.[1] As Adams says,[2] the fact "that the whole business of transportation between the West and the seaboard, and the prices which should be charged for doing it, had long been performed under common tariffs binding on the roads (the New York Central, Erie and Pennsylvania), and made by their agents at stated times, was a matter of public notoriety." For instance, the newspapers had long given, among their regular news, accounts of these meetings, just as they had reported the doings of State legislatures or of Congress. "That such meetings should have been held and such common tariffs prepared and published, was obviously a matter of mere necessity to the railroads. It would have been utterly impossible for them to live under the pressure of a war of rates knowing no limitation—a war in which freight of every description should be transported long distances absolutely for nothing. There was a time, for instance, when cattle were brought over the competing roads in New York at a dollar a car. Such competition as this plainly opened the widest and shortest way to insolvency, and it was to avoid it that the convention of freight agents met." As Adams says,[3] there was no secrecy about their meetings; the newspapers openly published the tariffs arranged by them, which took effect at stated periods, and which were subject to revision at other stated periods. The regular local tariffs, the tariffs which were not affected by competition, were no more open than the competitive tariffs so agreed upon. "The only difference," according to Adams,[4] "between the local and the through tariffs was that, whereas the former were fixed and rarely changed, the latter were subject to sudden and violent fluctuations."

[1] Stuyvesant Fish, President of Illinois Central, in "American Railroad.s"

[2] Railroads, p. 152.

[3] Ibid.

[4] Ibid.

It was from a desire to make these agreements of some avail, if possible, and to prevent these sudden and violent fluctuations which resulted in such an unsatisfactory state of business in general, that the celebrated "Saratoga Conference" took place. In 1874 Vanderbilt being at Saratoga, spending his vacation, a meeting was held there in which he conferred with representatives of the Pennsylvania and Erie roads. The result of the conference of three of the trunk lines was an arrangement by which, in addition to the usual agreement upon tariffs, the roads were to establish a board of arbitration to settle disputes. The idea was simply this: that the managers of the roads recognized the absolute failure of rate agreements under such conditions that any fancied violation, generally without even a suggestion of an investigation, was made a grievance which could be settled only by war; and in the hope of obtaining some beneficial returns from these agreements, they endeavored to substitute arbitration for war.

To quote again from Adams,[1] "In place of the 'Rob Roy plan' of leaving each company to assert its own rights and to maintain them if it was able, a central board was organized, the duty of which was to establish rules and tariffs which should be binding upon the various companies, and this central board it was intended should be clothed with sufficient powers to hold the companies firmly. It was an attempt to substitute arbitration among railroads for a condition of perpetual warfare."

The attempt was a failure. President Garrett, of the Baltimore & Ohio, refused to surrender the independence of his road. He expressed his willingness to adhere to his old policy of charging the agreed tariff of rates on through traffic; but he strenuously objected to submitting the action of his sovereign road to the supervision of some other power and followed strictly Washington's advice as to keeping aloof

[1] Ibid., p. 153.

from entangling alliances. The proverbial recklessness of the Grand Trunk was another disturbing factor. Nor could the Erie, being bankrupt, be relied upon as sure to follow a conservative policy.

The work of the conference was almost immediately upset by the Baltimore & Ohio, which began a severe war with its nearest neighbor, the Pennsylvania. A little later the Grand Trunk, assisted by numerous Western allies, started what was perhaps the most momentous railroad war on record; in fact, so far did it carry things that, as Fish says, "it bade fair to transfer to Boston the commercial supremacy previously enjoyed by New York." In 1875, the New York Central felt itself obliged to take action, which it did most summarily by reducing all through rates 60 per cent. In December of that year reason seems to have prevailed in the minds of the great generals, for they patched up a sort of truce. The conditions of this truce, however, were violated almost immediately (in fact one might think that it was made only to be violated), and in a few weeks there was a general melee, in which everybody hit everybody else, the New York Central, Erie and Grand Trunk taking the most prominent part. After some eight months of strife, which was stemmed once or twice, but at best only partially, by attempts at agreement which were doomed to immediate failure, the five trunk lines were ready for pretty nearly any kind of an agreement. The Baltimore & Ohio had abandoned all pretensions to independence and was quite ready to enter into any alliances, no matter how entangling; and the Pennsylvania having lost for the time being its ability to pay dividends, had lost with it all disposition to compete.[1] Hadley says,[2] "the fight ended in 1877, not because anything was settled, but because all parties were exhausted." I am rather inclined to agree with Larrabee, that something was settled, in

[1] Adams, p. 168.

[2] Railroad Trans., p. 95.

fact that a great deal was settled. Larrabee says,[1] that in time the railroad managers became convinced that, unless it was possible radically to reform railroad ethics, rate agreements could never be relied upon for the maintenance of rates at competing points. Experience convinced them that to make their agreed-upon tariffs effective it was necessary to deprive individual roads of the power or the inducement to cut below the agreed rates.

Failure almost Universal.—The experience of the trunk lines, in their attempts to maintain an agreed tariff of the rates to be charged on competing traffic, seems to be typical of the experience of all roads that made such attempts. Of course the courts would not enforce compliance with these agreements on the part of the roads making them, as the law discountenances combinations of this character as being in restraint of competition and against its own policy.[2] There being no way of enforcing such agreements, beyond the mere word of the manager of the road, they were violated whenever it came to be the interest of any of the agreeing parties to do so. Even where the principal officers made a simple agreement to charge only according to a certain agreed-upon tariff, where one would naturally suppose that if the managers were really in earnest they would stand by their pledge, the peculiar nature of the railroad prevented a satisfactory result. The rate-making power was turned over to numerous subordinate officials, over whom it is almost impossible to keep a close watch and to whom motives of honesty do not strongly appeal. As Fink said in one of his reports to the Bureau of Statistics, "This history of the management of the transportation business is constantly repeating itself. The general managers or heads of the departments attend generally to the establishment of rates, and make agreements with each other, and to this extent, but no further, this important business may

[1] Railroad Question, p. 193.

[2] Dabney—"Public Regulation of Railways," p. 144.

be said to be under their control; but no sooner is it believed that one or the other of the competing lines has violated the agreement, and tries to deceive, whether this be a fact or not, the management is of necessity surrendered into the hands of subordinates, the soliciting commission agents, to whom the general instructions are given to do as others are doing, or supposed to be doing;"[1] in other words, to make any rate they please, no matter how low.

That even a railroad president did not have control sufficient to enable him to prevent his road from violating an agreement, was clearly brought out in the testimony before the Cullom Committee in 1885, when Charles Francis Adams, then president of the Union Pacific, said that, curious as it might seem, he was unable to prevent cutting by his subordinates. His testimony is so suggestive on this point, and the idea is so well brought out in the testimony, that I quote exactly what he said:[2]

Mr. Adams.—If you could provide any way by which all freight and passenger agents could be absolutely debarred from making reductions from published rates, and from deceiving each other in some way or other while doing it, you would be very much more successful than I have been in my limited sphere. You would suppose that at any rate the president of a road would be able to get at the bottom of these things on his own road. I can only say that I cannot.

Question.—As president of your road, can you not manage your own men?

Mr. Adams.—No; theoretically I can, practically I cannot.

Question.—You cannot control them?

Mr. Adams.—I want you to understand what I mean. I do not mean that I cannot issue orders, and I do not mean that in each individual case those orders will not be observed to a certain extent, but the freight agent and the passenger agent is under a terrible strain all the time. He is working for his living. He is judged by results. All the time he has to meet the sharpest of sharp practices. If he is successful, and gets what is called his "share of the business," that is all right.

Question.—It is all right in the estimation of the company?

Mr. Adams.—I of course mean in the estimation of his superiors. If he does not get his "share of the business," he is very apt to be told some day that his

[1] Internal Commerce of United States for 1876.

[2] Cullom Committee Report, Part II, testimony, p. 1210.

services are no longer needed. Accordingly he will have recourse to every conceivable evasion. "Smartness," as it is called, thus becomes the quality most highly prized, especially in subordinates. Honesty and good faith are scarcely regarded. Certainly they are not tolerated at all if they interfere with a man's "getting his share of the business." Gradually this demoralizing spirit of low cunning has pervaded the entire system. Its moral tone is deplorably low. This is the root of the trouble as it exists to-day. That healthy, mutual confidence, which is the first essential to prosperity in all transactions between man and man, does not exist in the American railroad service taken as a whole. Of course there are exceptions to this statement. But as a rule, agreements are made only to be broken, and superior officials, under the fear of "getting left," as the expression goes, are constantly shutting their eyes to acts of cheating and evasion on the part of their subordinates, which are in direct disregard of solemn agreements those superior officers have themselves made.

The blame for violating these agreements is not to be placed wholly at the feet of the subordinate officials of the competing roads. An unscrupulous manager would not hesitate to increase his business by a reduction in rates as long as he could hope to escape detection. Of course, as soon as the other agreeing roads discovered the condition of affairs, they would retaliate by offering still lower rates to close-tongued shippers, and the violation of the agreement was sure to be discovered sooner or later. In fact, there was little danger that they would not discover such violations; often they thought they had detected a violation which had really not been committed. The roads were extremely suspicious of each other, knowing full well the advantages which would accrue to the road who could successfully keep secret the fact that it was asking a slightly reduced rate. In consequence, the roads were only too ready to listen to stories of violations of agreements by their rivals, and as it was to the interest of a shipper to make one line think its rival was already violating the agreement, the result can be imagined.

Sometimes the roads made agreements, when they intended, at the very time that they signed the paper, to break them as soon as possible. After such an agreement there was a race to see which line could break the agreement first and thus

enjoy a temporary gain until the others would make like reductions. Fink describes this state of affairs very clearly in an address to the Southern Railway and Steamship Association in 1876, when he said:

> A number of competing lines agree upon certain rates to be charged by each, and pledge themselves to strictly maintain the same. There may be some of the managers who honestly mean to carry out the agreement, but generally there are others who make agreements with the intention to break them, and merely for the purpose of taking advantage of the more honest. The fact that these agreements are hardly ever carried out has been fully established by past experience. The managers have no longer confidence that they can ever be carried out, and there seems to be a tacit understanding that agreements to restore and maintain rates, after a period during which low rates prevailed, are, in most cases, merely made for the purpose of practicing deception upon each other, starting for a higher scale of rates in order to secure, for a short period at least, some remuneration for the work performed, until low rates are reached again in the natural course of events. This mode of transacting business, based upon deception and dishonesty, has been elevated into a business principle in the management of railroad property, and is pronounced by many experienced railroad managers and general freight agents as the only possible or practicable mode upon which competitive business can be conducted.

Although Fink based the foregoing statement upon his experience with the railroads in the South, what he said would apply with equal force to the railroads in other parts of the country. All the railroad companies discovered, sooner or later, that agreements based merely on the word of the managers of the rival lines were of no avail in counteracting the influence of that disturbing factor, competition. Mere parole promises had failed, the law would not help the roads to enforce their agreements, and the railroad man was faced with a problem, the solution of which was necessary to preserve not only his own existence, but also the business interests of the community as a whole. How were the roads to prevent the evil results of competition: secret cutting or personal discrimination, and open cutting, place discriminations and bankruptcy? That was the problem.

And this problem was solved in an intensely practical way —by removing the temptation which prompted the roads to violate an agreement. Some shrewd Yankee discovered that the railroad managers were only human—that, like the rest of us, they resemble the man in "Life" who said the only thing he couldn't resist was temptation—and accordingly formulated a device which would *remove* the *temptation* to violate agreements.

Agreements to Divide Traffic.

Idea at Basis of Pooling Agreements.—The idea at the bottom of all pooling agreements is to remove the temptation to violate them. A simple agreement based on word of honor failed. An agreement where each company made a large deposit to be forfeited in event of a violation of agreement failed, because of the possibility that a secret violation might escape detection. If, however, a road is told—"you can haul one-third of the traffic between Chicago and Omaha"—that road is not going to make secret rebates or discriminations, because they will only cause loss. Of course a road will yield to the temptation to cut if it can secure greater earnings by so doing, but if a manager knows that he is going to get only a certain portion of the traffic hauled on all the roads, he also knows that every rebate is just so much paid out of the coffers of the road for no return.

The object of the pool was to maintain rates; it attained that object by removing all temptation to charge any other rate. At least that was the foundation of the ideal pool, and in so far as that was the foundation, the pool was successful.

Early History.—Exactly when and where the idea of pooling originated is difficult to determine. From the very nature of things, their early history is obscure and almost impossible to be gotten at (if indeed it ever existed in any tangible shape). The first pools were formed before railway affairs were the

object of public investigation. The roads, of course, made every effort to keep the facts secret, meagre and indefinite; the charming frankness which prompted President Thomson, of the Pennsylvania, to openly allude to an agreement in his reports for 1855 and 1858, soon ceased to prevail.

Hadley says, "the earliest railroad pools were probably developed in New England, but they were on a small scale, and the whole thing was often so quietly done that their very existence was almost unsuspected."[1] President Fish, of the Illinois Central, in speaking of the trunk line pools said, some years ago, that "the pooling idea is not so recent as might be supposed, however. It was introduced into New England and quietly used for a long time." These pools did not have any great influence on railway conditions in New England and they have little more than an historical significance.

Pools in the West.—The first great instance of an application of the apportionment idea to competing roads, which has had important history, occurred in the West—on the three lines running between Omaha and Chicago. In 1870, the Chicago-Omaha pool was formed by the Chicago & Northwestern, the Chicago, Rock Island & Pacific, and the Chicago, Burlington & Quincy Railroads. In that year these three roads determined that the receipts from through traffic played too important a part in their total revenue to be trifled with, and accordingly made an arrangement whereby each road should be guaranteed its share of such traffic. The three roads enjoyed practically equal advantages in competition—length, grades, etc., being almost identical—and the agreement provided that each of the three was entitled to haul 33⅓ per cent of the total through traffic between Chicago and Omaha. The pool established the following arrangement:[2] the through business, without any solicitation on the part of the companies,

[1] Railroad Transportation, p. 91.

[2] Annual Report for 1878 of the Iowa State Board of Railroad Commissioners, p. 48.

was to take any of the three routes, the rates being uniform; each road was allowed to retain 45 per cent of the passenger, and 50 per cent of the freight gross earnings, the remaining percentages being equally divided among the three companies. Later the agreement as to passenger business was slightly modified, so that all gross receipts from passengers going East and from travelers buying tickets at Chicago going West were equally divided.

Although there was a State law[1] in Iowa prohibiting pooling of earnings between parallel lines, this arrangement was not illegal, as the pool applied only to traffic between Council Bluffs and Chicago, which being interstate commerce, was not subject to legislative control by the State of Iowa.

This pool was unpopular in the State of Iowa, but the State railroad commission sided with the railroads in the matter. In one of their reports they say,[2] "We look upon the pool as the only agency that can compel the through traffic to bear, as it should, its proportion of the interest on the cost and the expense of maintaining and operating the roads." Later, speaking of the danger of the pools being broken, they said,[3] "The practice that has been so much in vogue, since railroad competition became strong, of carrying through business at rates that were not remunerative, and making up the losses on local business, is, we think, a mistaken one. We see no simpler method of reaching a fair compensation for through traffic than that adopted by the Iowa pool lines, and we believe that to break the pool and open a warfare would be an unfortunate move." Thus in 1878, we find a State board of commissioners recognizing the great evil that resulted from place discriminations and the benefit, to at least the local shippers, which resulted from a successful pool. Looking at the situation merely from the standpoint of the inhabitants of

[1] Section 1297, Code of 1873.

[2] First Annual Report, p. 48.

[3] Ibid., p. 49.

the State, who were of course only indirectly affected by the pool, they realized[1] that "a wrong is done the producer and shipper if the through business is carried at a loss, and the loss made up from local or Iowa business."

The Chicago-Omaha pool continued in operation, on the whole successfully, until 1884, when it merged into a larger association known as the Western Freight Association. I say "on the whole successfully," for there was not a complete harmony in its operations during the fourteen years.[2] In the summer of 1882, there was, according to the report for that year of the Iowa State Board of Railroad Commissioners,[3] a disagreement concerning the distribution of freight, and a war of rates followed, continuing until October.

Although this war came to an end in October of the same year, the settlement of the dispute was not finally concluded until the formation of the Western Freight Association. Here were united the several disturbing elements which had prevented a really successful working of the pool since 1880, and a form of organization and government was adopted closely allied to that of the Southwestern Association.[4] This new association included all the roads operating between Chicago, Milwaukee and St. Louis on the east and Omaha and Council Bluffs on the west.

Operating immediately to the north, the Northwestern Traffic Association comprised all roads engaged in the transportation of freight between Chicago and Milwaukee on the one hand, and St. Paul, Minneapolis and Minnesota Transfer on the other.

All roads east of the Missouri River and west of Chicago and St. Louis (excepting the St. Louis & San Francisco) that

[1] Report for 1878, p. 49.

[2] Larrabee is accordingly mistaken when he says (on p. 194) that this pool "lasted fourteen years without a break."

[3] Annual Report for 1882 (Nov. 30), p. 48.

[4] Cullom Com. Rept., p. 231.

carried business destined to or originating in Colorado and Utah, were united in the Colorado-Utah Association. In line with this association, although distinct from it, was the Colorado Railway Association, which comprised the roads west of the Missouri River engaged in the transportation of freight traffic to and from competitive points in Colorado. Then there was the Pacific Coast Association, which included all roads east of the Missouri River and St. Paul, and west of Chicago, Milwaukee and St. Louis (again excepting the St. Louis & San Francisco), which carry business destined to or from points on the Pacific Coast, including Oregon, Washington and British Columbia. Immediately west of this compact and fitting into it, was the Transcontinental Association, which included all roads west of St. Paul, Omaha and Kansas City, and a north and south line drawn through the two last named cities on the east and the Pacific Coast on the west. All of these compacts were governed by rules similar to those adopted for the guidance of the Southwestern Railway Association, to be later described.

At the time of the Cullom Committee's investigation in 1885, the whole of the competitive traffic of the West and Northwest was under the control of some one of the numerous traffic associations. An unsuccessful effort had been made in 1878, to unite all of the roads and associations interested in the movement of through Eastbound freights into one gigantic pool.[1] The idea was that Chicago was to be the pooling centre, a schedule of rates fixed for it, and the rates of all the railroad centres in the West and the Northwest dependent upon it. The combination was to comprise more than forty companies, controlling over 25,000 miles of road. The scheme was actually tried for three months, but it was beyond the power of man to harmonize such a multitude of discordant elements. It was after the failure of this gigantic Western pool, which had really been organized under the

[1] Larrabee, p. 200.

protectorate of the trunk lines, that the companies which had composed it formed, as their individual interests dictated, most of the various combinations already described.

One of the most instructive parts of the history of railroad combinations to overcome competition is to be found in the history of the struggle between the competing roads connecting the Missouri River points with Chicago and St. Louis, respectively. For some years after the roads from Chicago and St. Louis were completed through to the Missouri River, they agreed upon rates of freight,[1] but, as no pledge for their maintenance was given, the rates were not adhered to. Charges of bad faith, denials and counter-charges were of common occurrence. The inevitable war followed, which attained its most severe aspect in the spring of 1876, when rates fell so low that no profit remained in the business. In order to restore rates to a paying basis, the managers of the interested lines met at St. Louis on May 4, 1876. There they entered into an agreement of a twofold nature—to maintain rates and to establish the differentials which should prevail between the St. Louis and Chicago rates to and from the Missouri River points. This effort met with no success, however, because there was no agreement as to the share of the traffic which each road should be allowed to carry. This defect, however, was soon discovered by the managers, and on the twelfth of September following (1876) a division of the earnings derived from the traffic was agreed upon between the several lines. The organization formed for effecting this purpose was known as the Southwestern Railway Rate Association. There was no attempt made to force traffic over a particular line which was not securing its share of the freight; each road hauled all the freight offered it at agreed rates, then, after deducting 50 per cent from the gross earnings on such traffic to pay

[1] All information as to this pool is based on the Report for 1879 on the Internal Commerce of the United States, unless otherwise stated. Chap. VI, Appendix 4, and Part II, p. 174.

operating expenses, the remaining 50 per cent was turned over to a common "pool." This pool was in turn divided among the roads in accordance with a fixed percentage already agreed upon. Later, when the new revised agreement went into effect (September 1, 1877) the amount allowed each road for hauling was reduced to 40 per cent. The remaining 60 per cent was divided among the roads in proportion to the business done by the several roads during the past year.

One very valuable feature of this association was the clearing house under the control of the Secretary, who was required to audit all accounts and settle balances between the roads. Unfortunately this part of the association's organization did not survive the reorganizations which soon followed.

On the fourteenth of March, 1878, the association was disrupted by the withdrawal of the St. Louis roads, which, having paid $150,000 in balances to the Chicago roads, determined that the large movement of wheat to St. Louis was natural, and so they resolved to pay no more such balances. However, the opening of the Lake navigation soon made the balance the other way, and accordingly on the fourth of May the association was reconstructed. The associated roads were divided into three divisions—the Chicago, the St. Louis and the Hannibal. The division of traffic was as follows: Chicago Division, 45 per cent; St. Louis Division, 45 per cent; Hannibal Division, 10 per cent. The several roads in each division agreed among themselves what proportion of the share allotted to the whole division should be carried by each individual line.

This agreement lasted less than a year, being formally dissolved on the twelfth of April, 1879. Then followed one of the most severe contests in the history of railroad wars. The rates fell so low that the business carried up to September 12, a period of five months, entailed an actual loss in revenue of about two million dollars.

On September 15, 1879, the Southwestern Railway Rate Association was reorganized, when it took the form to which it substantially adhered up to 1887. This agreement made provision for a resort to arbitration in the event of any controversy. A method of securing impartial arbitrators was embodied in the agreement.

This pool continued in substantially the same form until 1887,[1] with no little success, although the "intractableness" of the average railroad manager often aroused the ire of their commissioner, J. W. Midgely. In his statement to the Cullom Committee in 1885, he said:[2]

> Notwithstanding it is to the immediate interest of a road when it becomes party to a pool to adhere strictly to the agreement, such is the weakness of human nature, under the blandishments of shippers, that few are the number who firmly resist. Soon the breach of faith is discovered, whereupon confidence is destroyed, and with difficulty are the others restrained from making reprisals. If the violations are repeated, protective measures are adopted, and the agreed rates are ceased to be regarded. This has been the mortifying experience of all compacts, thus compelling the admission that no means have yet been devised whereby an absolute maintenance of established rates can be assumed. Self interest has failed to effect it, hence compulsory legislation could not be relied on to accomplish it. Yet, despite their imperfections, the fact remains that the pools which have been wisely ordered have approximated the desired results, whereas, all other forms of regulation have failed.

In a statement made to the Bureau of Statistics in 1879,[3] this same commissioner explained what was perhaps the greatest cause of the lack of confidence among the members of the pool—that is, the various compacts were always hampered by a conscious weakness, arising from the fact that they depended solely upon the honor of the members. The railroad manager knew that he could not go into court and sue for balances withheld from him, hence there was a constant distrust lest when any member should be called upon to pay over

[1] Cullom Committee Report, p. 230.

[2] Ibid.

[3] Report on Internal Commerce—Reports of Experts, p. 58.

a large amount he would refuse, and a disruption ensue. It was on account of this that Midgely was in favor of legalizing pooling agreements.

Pools in the South.—The really sharp competition between the railroads of the South came later than it did in the North and West, but when it did come (shortly after the war) it came in earnest. As Vigil Powers, later a commissioner of the Southern Railway and Steamship Association, said, "there was not so much business as all could do. Indeed, any of these lines, with a comparatively small output for rolling stock, can do all the business to any, indeed to all, competitive points named in our circulars."[1] The natural result was the presence of the evils of secret rebates, open cuttings and wars, and place discriminations. Rate wars were so severe that Mr. Fink estimated the loss caused by them to be such that gross earnings were 42 per cent less than what they would have been under regular rates.[2] Joseph Nimmo, after reciting the various abuses caused by competition in the South and the evil effects which they had on business in general, concludes his sketch of the conditions which gave rise to combination in the South, as follows:[3] "This condition of affairs not only operated prejudiciously to the interests of trade by breaking down competition, but it also operated detrimentally to the interests of the Southern railroads and of the coastwise steamer lines, by virtually placing them under the control of a few large shippers, whose interest it was, by secret operations, to keep the managers of the various lines in a continual struggle with each other."

The railroads of the South made their first effort to overcome these evils by co-operation in December, 1873, when

[1] Circular letters of the Southern Railway and Steamship Association, Vol. 3, p. 991. (Quoted by Hudson.)

[2] Circular letters, Vol. 1, p. 278. Also quoted by Hudson. In fact most of my information in regard to conditions in the South has been derived from his excellent study in the Quarterly Journal of Economics, Vol. V.

[3] Internal Commerce of the United States, p. 171 (1879).

four roads connecting Atlanta, Ga., with the seaboard,[1] agreed upon divisions of the cotton business.[2] This, however, covered only the cotton season of that year. In order to bring about some permanent means of settling the difficulties that were constantly arising between the Southern roads, they held a meeting at Macon, Ga., on December 21, 1874.[3] An adjourned meeting was held in January, 1875, when an agreement was signed and a provisional apportionment of the traffic between competitive points was arranged for.[4] For the purpose of keeping the accounts a clearing-house was established.[5]

In September of that year, a convention of managers of Southern railroads and steamship lines was held, at which Mr. Albert Fink presented a paper embodying the principal features of an organization.[6] In October, Mr. Fink was elected general commissioner,[7] and he immediately set to work to organize and put in motion the pool. The result was the Southern Railway and Steamship Association—the second apportionment scheme of any considerable magnitude and importance established in this country.

The membership of this association comprised the railroads in the States of Virginia, North Carolina, South Carolina, Georgia, Tennessee and Alabama; and also the steamship lines connecting these roads with Boston, New York, Philadelphia and Baltimore.[8]

In accordance with its plan of organization, the association held an annual convention composed of one representative from each line. At this convention officers and an executive

[1] Report on Internal Commerce (1879), p. 171.
[2] Circular letters, Vol. 22, p. 1619. (Hudson.)
[3] Hudson Quarterly Journal of Economics, Vol. V, p. 72.
[4] Ibid.
[5] Internal Commerce, p. 172.
[6] Internal Commerce, 1879, p. 177.
[7] Circular letters, Vol. I, p. 18.
[8] Internal Commerce, 1879, p. 172.

committee were elected. A general commissioner had general charge of the workings of the agreement, being supposed to refer to the convention any matters with which he was unable to deal. This practice of referring details to the annual convention was found to be impracticable, so in 1883 an executive committee was provided for, to consist of the managers of each of the principal lines. This committee was given jurisdiction over all joint traffic, but a unanimous vote was required for action. In the event of a failure to arrive at such a decision, it was provided that the matter should be referred to a board of arbitration. The executive committee had subordinate to it a rate committee, which had control, subject to appeal, of rates and apportionments.

The competitive traffic was apportioned among the rival roads by the executive committee, or, if a unanimous agreement could not be reached, by a board of arbitrators. The principle which guided the committee or the arbitrators in the division was that shares should be apportioned as nearly as possible to what each of the roads would get under nominal competitive conditions. Each road was expected to carry, as nearly as possible, its allotted amount. In case a road should carry more than its exact proportion, it was allowed, for the mere hauling, 20 per cent of the gross receipts from such excess, and the remaining 80 per cent was turned into the pool to be divided among the roads which had run behind their proportions.[1] At first the allowance for hauling was one-half cent per ton per mile, but this was abandoned in the later years of the pool, being considered too high.

The evil which Midgely complained of so strongly in his Southwestern Association was also present in its Southern neighbor. The roads were slow in paying over the balances to those roads that had run behind. But this abuse was soon corrected by requiring each of the roads to deposit monthly 20 per cent of its gross receipts to the order of the

[1] Hudson, p. 74.

commissioners. Then the commissioner, at the end of the month, paid over to the "short" roads the balance due them out of this deposit, returning the remainder of the 20 per cent to the original depositor. In other words, the association held funds belonging to each road sufficient to remove any temptation to withdraw from the association for the sake of keeping the balance due another road. All danger of fraud, such as secret rebates, under-billing, incorrect classification, etc., was obviated by the complete power of the commissioner to examine all books and bills.

The association's greatest source of danger lay in the difficulty of apportioning the traffic fairly among the several competing roads.[1] For example, in 1883, the East Tennessee became dissatisfied with an agreement which allowed it only 14 per cent of Montgomery cotton traffic; it asserted that, to avoid paying the heavy penalty of $1.50 per bale for excess carried, they had been compelled to turn over to their competitors several thousand bales. In 1883–84, the cotton traffic accordingly was not pooled, and the East Tennessee carried over 27 per cent of the business, even though full association rates had been maintained. The matter was finally settled by arbitration, which gave the East Tennessee 22 per cent.

The question of allotments was continually coming up and the number of routes on which the traffic was pooled was steadily increased up to 1887. At Atlanta, for example, the number of pooled routes had grown from 5 to 12. The arbitrators were generally able to render a satisfactory decision, and where the roads became dissatisfied with a division and went out of the pool, the almost universal experience was that the greatly reduced charges, made during the ensuing rate war, necessitated a larger increase of traffic than could be secured. The result of the pool was not an elimination of competition. The agreement binding the association together was re-enacted every year, at which time were also re-enacted the allotments

[1] Hudson, p. 83.

of the traffic to each of the several competing roads. Between the periodical apportionments each road made a strong effort to get as much as possible of the available traffic, so that, even if all earnings on an excess did have to be paid to the other roads, the next allotment would give to such a road a larger share. As Hudson puts it,[1] "Each road tried to carry as much freight as possible, so that, when the next contract came to be made, it might demand with some show of reason a larger share of business. It is competition of this sort that is advantageous, not competition with little or no regard to the cost of doing the work."[2]

The rates made by the association were regulated by certain external competitive forces over which the association had little or no control. It was found that if the rates between Atlanta and New York were increased beyond a certain limit, the trade of Atlanta would be driven to other competing trade centres. Again, sailing vessels competed with the steamer lines of this association between the Northern and Southern ports. Rates by sailing-vessel and rail between the Northern ports and points in the territory of the association had to be met by the association. Besides this there was regulating influence of rates via the Mississippi River, and the railroads extending from that river into the territory of the association. In spite of these influences, however, the association was able to exercise a very large discretionary power over the rates which were to prevail to and from all points within its territorial limits in the Southern States.

In its dealings with lines that would not become members the association used its powers in an unjustifiable manner. In the revised rules adopted in December, 1876, the following provision occurs: "If any company owning or operating a

[1] p. 94.

[2] Larrabee's statement (p. 195), that there was no inducement for any company to seek to carry more than its allotment "the nominal price allowed for carriage on an excess being so low" is thus not borne out by the facts.

line of transportation in connection with the roads or lines of companies, parties hereto, shall refuse to become a member of the association, such line shall, as far as practicable, be refused recognition as part of a through line."[1] In other words, such lines were to be boycotted. This rule does not appear in the later agreements, but, as a matter of fact, I believe the facts would bear me out in the statement that this principle was nevertheless adhered to, though to exactly what extent is of course impossible to determine.[2] For example, in 1877, the steamship lines between the Southern ports and Boston and New York refused to co-operate with the association in carrying out its rules. The commissioner accordingly authorized greatly reduced rail rates to Boston and New York, as well as to the South Atlantic ports. The result was that in three weeks the refractory steamship lines joined the association and rates were restored.[3] Another troublesome competition was found in that of the river steamboat lines. Often the differentials between two cities, such as St. Louis and East Cairo, were sufficient to allow the boats to charge under the association rates. To prevent this, in the case referred to, the rates to East Cairo were raised to make them the same as to Cairo, across the river.[4] Rates to Selina and Montgomery from the East were cut in a similar way by the New York and Mobile steamship lines. The association changed their rates to stop this; a few months later, the competition being withdrawn, the rates were restored.[5]

The changes in the organization of the Southern Railway and Steamship Association after the passage of the Interstate Commerce Law in 1887 will be considered later.

[1] Circular letters, Vol. 2, p. 598.

[2] See Larrabee's "Railroad Question," and J. F. Hudson's "Railways and Republic."

[3] Henry Hudson Quarterly Journal of Economics, p. 86. (Vol. V.)

[4] Ibid.

[5] Ibid.

Pools in the North.—The history of the attempts of the trunk lines to maintain rates and to overcome the effects of competition has already been considered. The nature of the competition between the rivals was so complicated that the resulting evils could not be overcome by mere agreements between the managers. The lesson had been learned by 1877, that, unless there were some way of removing the temptation to violate an agreement, the agreement might just as well not be made: and it was in that year that the new device for removing the temptation was first put into operation in the North.

Agreements to divide the business in order to do away with competition had been used before that time, although with only limited scope. The first important combination of this kind in which the Northern railroads engaged was formed by those interested in the transportation of anthracite coal. The "anthracite coal combination," as it was called, had two distinct objects in view. First, to obtain a remunerative price for the coal by restricting its production; and, second, to divide among the carriers, who were at the same time those most interested in the production, the total amount of competitive traffic according to certain fixed proportions.[1] Ruinous competition, *i. e.*, competition in which the parties interested seemed to forget self-interest in a vain endeavor to overcome their rivals, had existed in coal mining and hauling to such a degree that in 1872 the roads entered into a compact for self-protection.[2] This compact continued in force from December 1, 1872, to August, 1876.[3] So long as this agreement was in force, all went well, but upon its dissolution the price of coal and rates of transportation fell so that several of the companies were obliged to cease paying dividends, one to obtain an extension of time from its creditors, and one to go

[1] Ringwalt, p. 273.

[2] Internal Commerce Report, 1879, p. 179.

[3] Ibid., p. 180.

into the hands of a receiver.[1] The roads entered into another agreement on January 1, 1879, which lasted for one year.

This agreement went to pieces at the end of the year, mainly because one of the roads refused to accept terms offered by the other roads.[2] From 1878 on to 1887, similar compacts were generally in force and they undoubtedly did much to check excessive competition. They were scarcely ever fully effective, however, mostly because the Pennsylvania refused to enter into a combination which had for its object the restriction of the production of coal; but there were numberless other dissensions and legal hostilities continually disturbing things.[3]

The device known as the "evener system" was the form of combination which undoubtedly provoked the strongest public censure and led to the worst abuses. The first application of the "evener" principle to competitive traffic was made in 1875 to the live stock traffic between Chicago and the East.[4] For this traffic there had been a tremendous competition between the trunk lines, live stock being frequently transported at less than cost.[5] The evener plan involved two steps—first, to determine what part of the traffic should be hauled by each of the competing lines; and second, to enter into an association with certain of the principal shippers, who agreed to divert their shipments over the different lines so as to secure to each road its allotted portion. These shippers were known as "eveners," and in consideration of their services as such, they were allowed a rebate not only on the shipments made by themselves, but also on all those made by other parties. The result was to give them a great advantage over

[1] Ringwalt, p. 273.

[2] Hudson, p. 222.

[3] Ringwalt, p. 273. Consult, also, G. O. Virtue's paper on "The Anthracite Combinations," Quarterly Journal of Economics, Vol. 5, for a full and careful history of the coal carriers' pools.

[4] Internal Commerce Report, 1879, p. 177.

[5] Hepburn Testimony (Blanchard), p. 3316.

their competitors in business, often resulting in a monopoly. According to Ringwalt,[1] the scheme met with such strenuous and determined opposition that it was abandoned by the railroads in 1879, since which time the transportation of live stock has been subject to regulations similar to the other forms of traffic.

The greatest advantages granted to any evener were those given to the Standard Oil Company. This company received as a compensation for so dividing the petroleum traffic between the different lines carrying oil, special advantages,[2] which enabled the company to establish a monopoly of great strength.

When in 1877 there came a cessation of the trunk line wars, whose history we have already considered, the companies had learned a very valuable lesson. In order that they might profit to the utmost from their experience, they called Albert Fink to their assistance, the man who had been so successful in the South. The four trunk lines organized July 1, 1877, and established an executive committee, with Albert Fink as chairman. During this year the Westbound traffic from New York was pooled and the traffic apportioned among them according to the following percentages:[3] The New York Central received 33 per cent, the Erie 33 per cent, the Pennsylvania 25 per cent and the Baltimore & Ohio 9 per cent. If any road received more than its allotted share of the freight, the amount of the excess was to be turned over to a road which was deficient. The conditions involving the Eastbound traffic were more complicated, and a division was not completed until two years later.[4]

On the seventeenth of December, 1877, the railroads in what is now called Central Traffic Territory—the region between

[1] p. 273.

[2] "Railways and the Republic," Chap. III. Also Hepburn Committee Report.

[3] Ringwalt, p. 274.

[4] Hadley, p. 95.

Buffalo and Pittsburg and the Mississippi River—formed an organization and established an executive committee similar to the one that the trunk lines had appointed. The next step was to form a joint organization to supervise the competitive business, in which the trunk line and the roads west of them both participated. An organization was formed similar to the Southern Railway and Steamship Association. This new association went by the name of the Joint Executive Committee, and Albert Fink was chairman. This association, according to Hadley, was never so strong as its Southern prototype. There was no clearing-house, and no central authority with power to form pooling agreements—the voluntary action of each road was required in every case.[1] There were three distinct sets of activities assigned to this new body:

1. The decision of what differential should be allowed Philadelphia and Baltimore, by virtue of their disadvantageous position, as compared with New York and Boston.

2. What percentage of the traffic hauled should be allowed each of the available roads.

3. Consideration of general business arrangements, matters such as rates, hauling of joint traffic, etc., under the Joint Executive Committee.[2]

This arrangement was not satisfactory to the people of New York, who claimed that their city suffered in proportion as its more favored rivals, Philadelphia and Baltimore, became commercially more prosperous than in periods of unregulated competition. Simon Sterne claimed, in a letter published in the Report on Internal Commerce for 1879,[3] "that the effect was to transfer rental values in New York to Philadelphia and Baltimore." Accordingly in the year 1881, the agreement was violated by the New York Central, which avowed its

[1] Hepburn Testimony (Blanchard), p. 3120, 1, etc.; also, Fink's Railway Problem and its Solution, 1880.

[2] Internal Commerce Report, 1879, p. 165.

[3] Appendix, No. 2.

intentions of returning to the status of competition.[1] A fierce war then followed, which lasted for eight months, when the roads decided to put the matter before a board of arbitrators. A board was selected, to consist of Messrs. Thurman, Washburn and Cooley. There were no charges of unfairness against these men, who rendered a report on the situation and on the results of their investigation, but the problem was not solved; they gave an impartial abstract of both sides of the dispute and decided that the existing differentials between seaboard cities were reasonable. At about the same time Albert Fink made his now classic "Report on Adjustment of Railroad Transportation Rates." He showed in effect that the seaboard cities were simply intermediate points en route from Chicago to Liverpool, and argued that the differential rate ought to counterbalance exactly the difference in the cost of ocean carriage, if the problem was to be solved on a theoretically correct basis. Practically, he said, things would quickly adjust themselves to an arbitrary basis, but an effort should be made to fix that basis so as to prevent the instability consequent upon continuous readjustments. With Fink's assistance a peace was patched up between the roads on the basis of this principle. But in 1884, war broke out again and assumed a very serious form, although the harmful results to the roads were not so marked because of the large traffic available.

In November, 1885, the differences were settled by the adoption of an agreement and code of rules. The combination then formed is important as marking the result of thirty years of experience, and the principles on which the combination was based formed the latest product of that evolution which was so abruptly terminated by the passage of the Interstate Commerce Act in 1887. Without unduly extending this narrative by including an account of other pooling organizations that were established before 1887, it will suffice to present the plan adopted by the trunk lines in 1885.

[1] Fink, Report on Adjustment of Railroad Transportation Rates, 1882, p. 7.

The purposes of this agreement are set forth in the following preamble:

> Whereas, past experience has fully established the fact that the joint action of competing railroad companies in establishing and adhering to uniform rates of transportation for like services to the public is necessary in order to avoid the evils of unjust discrimination and fluctuating rates, so injurious to commercial as well as to the railroad interests;
>
> Therefore the parties above named[1] enter into the following contract for the purpose of jointly establishing tariffs over their respective roads on competitive traffic, both passenger and freight, and of publishing said tariffs and strictly maintaining the same.

This agreement provided in brief, for submitting disputes which could not otherwise be settled, to arbitration; for holding Western connections in check by joint action of the agreeing roads; for joint schedules and classifications, and finally, for division of the competitive traffic among the several competing roads.[2]

In order to carry out these provisions a trunk line organization was formed and a body of rules adopted. The organization consisted of a presidents' committee, which served as a court of last resort for the settlement of disputes before an appeal to arbitration; of an executive committee, which was charged with carrying out the previous committee's orders, and also to settle problems, if possible, without a reference to the higher committee, and of freight and passenger committees, which had charge of their respective branches of the traffic. A permanent arbitrator was also appointed by the presidents' committee, to whom was "submitted for final decision all questions arising under the contract upon which the parties thereto cannot agree." It was provided that, in case of one road discovering a rival in the violation of the agreement, the executive committee was to be notified and given all possible

[1] Grand Trunk of Canada, New York Central, Erie, Delaware, Lackawanna & Western, Pennsylvania, West Shore and Baltimore & Ohio.

[2] Cullom Committee Report, p. 237.

information, but "pending the action of the executive committee, the complaining party shall not meet any alleged reductions in rates or take any separate action whatsoever in violation of the contract, all action necessary to protect the trunk lines and their affiliated roads shall be taken jointly." [1]

Under the provision as to dividing the traffic among the several competing roads, all danger of failure to pay over excess balances was obviated by the requirement that balances should be settled monthly, and that each of the roads should deposit with a trustee an amount of money sufficient to enable the drafts for monthly settlement of balances to be drawn upon it.[2]

Throughout the whole history of the attempts made by the trunk lines to combine, we find a disturbing factor at work which would often upset a combination almost as soon as it was made. This factor was the competition with the carriers by water, which was an ever potent force and one which could not be restrained.

That the effect of the water route by the Lakes and over the Erie Canal and Hudson River was to break down the pools arranged by the trunk lines is brought out very clearly in the evidence before the Hepburn Committee. For instance, a larger shipper in New York, Charles Greiner,[3] who enjoyed a special rate from the New York Central, testified as follows:

Q. What ground was there for withdrawing your special rate for a time?

A. There was some understanding between the roads—some pooling arrangement, I believe—that they agreed not to give any special rate to anybody; it was in the winter, and, of course, then we had to pay full rates; it only lasted for a little while—for a month or two—and we told them that if they did not give us special rates we should not ship by them the following summer, but would use the canal.

Q. And they then gave you the special rate?

A. Yes, sir.

[1] Cullom Committee Report, p. 240.

[2] Agreement—Article VII.

[3] Hepburn Testimony, p. 2169.

This single piece of testimony contains in a nutshell the nature of the agreements made by the railroads. In order to do away with the special rate, they combine and agree to give no more, all goes well for a short time, and then there comes in a disturbing factor which cannot be controlled. The competition with the canal was one of several influences which rendered any remedy for railway competition so difficult. There was also the competition with other routes; large portions of the crops of the West could be shipped either to the Atlantic seaboard or to the Gulf ports, according to the relative charges. A constant competition prevailed between the two great outlets. Then, in addition to the numerous external competitive influences that were at work, there was quite a scope for competition to have an influence even between roads which were strictly regulated by pools. There was the constant desire to increase traffic, even if there were no return, in order that at the next periodic revision of the apportionment, a larger share might be allowed the road showing an excess. These competitive influences, both external and internal, while they were of course not so potent a factor as absolutely unrestrained competition would have been, were nevertheless of great significance in determining the actual results of the pools.

As to the actual course of rates during the ten years in which the traffic on the trunk lines was pooled, it seems from reliable evidence that they were certainly not extortionate; in fact Blanchard goes so far as to say[1] that "no American pool can be cited which advanced rates unless to restore unjustifiable rate war reductions." His figures substantiating this statement are certainly reliable, at least so far as they apply to the trunk line pools. When the pool was organized (in 1877) the average of the eastward and westward tariff class rates between Chicago and New York was 71 cents per hundred

[1] New York Mail and Express—"Railway Pooling," Paper No. 4.

pounds. When pooling was discontinued in 1886, the rate was under 50 cents.[1]

Blanchard's figures[2] as to the actual tonnage transferred from one road to another under the pool, are especially significant. In the last year of the eastern pools from Chicago, St. Louis, Peoria, Cincinnati, Louisville and Indianapolis, all the tonnage changed from one route to another at all these points was only 22 per cent of the total. The cash paid by the same companies to each other in money settlements did not average nine cents per ton. (The significance of this figure is seen when it is compared with the fifty cent reductions which were usually made during rate wars.) Of about $12,000,000 pooled freight earnings, less than $300,000 changed hands. These figures certainly speak well for the success of those who arranged the apportionments.

REVIEW.

The pooling system of restraining competition, which grew up after the failure of the simple rate agreements, had its origin between 1870 and 1880. During those years the idea was planted all over the country and so general was its growth in the next few years that by 1887, nearly all classes of traffic for which a considerable number of railway companies actively competed, had been pooled.

In all of these combinations the principle was the same, although the method of its execution often differed. Several competing roads would determine, as nearly as possible, what share of the competitive traffic fell to each under the nominal conditions of competition, then they would agree that each road should haul as nearly as possible the amount to which it was entitled, and in case a road should receive more business than it was allotted, the matter was easily adjusted either by hauling the freight and transferring the receipts to the road

1 "Railway Pooling," Blanchard, No. 4.

2 Ibid.

with a deficit, or by transferring the freight itself. Very often there were disturbing factors which the roads could not draw into the combination and which continually interfered with the satisfactory workings of the agreement. The influence of water competition in regulating railroad pools was emphasized by the Cullom Committee; they say in their report[1] "that their influence (*i. e.*, of the water routes) is not confined within the limits of the territory immediately accessible to water communication, but extends and controls railroad rates at such remote and interior points as have competing lines reaching means of transport by water. Competition between railroads sooner or later leads to combination or consolidation, but neither can prevail to secure unreasonable rates in the face of direct competition with free, natural or artificial water routes."

The agreements and organizations which have been described do not include all traffic associations, but those mentioned are typical. They were all based on one principle, had similar obstacles in their way, and met with more or less success according as they were able to overcome those obstacles. In all associations there existed, even under the strictest arrangements, competitive influences which could not be smothered, such as the desire of the individual road to increase its allotment; formation of roundabout routes in case of too high rates; presence of water lines, both canal and river, which were difficult if not impossible to harmonize in a pool with railroads; the rivalry of markets; these and numerous others which exerted a strong regulative if not actually restrictive control over the operations of the railroads in their pools.

[1] p. 170.

CHAPTER III.

LEGISLATION AND ITS RESULTS.

Prohibitive Legislation.

Public Opposition.—The early combinations of the trunk lines met with an outburst of popular animosity, the more radical side of which found its expression in the New York and National Anti-Monopoly Leagues that flourished in the sixties. The first really serious opposition arose, however, after the results of the Saratoga conference became known. According to Charles Francis Adams,[1] an "alarm and popular clamor was excited throughout the country. It was looked upon as a movement against public policy, and the plan for operating the combined roads which resulted from its deliberations was denounced as one which, if successfully carried out, must necessarily result in the destruction of all competition for carriage between the seaboard and the West, and as consequently turning over to a band of heartless monopolists the vital work of transporting the cereals of the interior to their market. The cry of 'railroad kings' and 'railroad extortioners' was at once raised from every quarter."

Public opposition to traffic agreements and pools has been of two distinct kinds: First, that arising from those shippers and communities which benefited by the discriminating rates caused by unrestricted competition; and, second, the more general feeling of fear as to the possible results of a system which placed such power in the hands of a few men and which seemed to undermine the foundation of the industrial system by substituting monopoly for competition.

The first form of opposition has had a much greater influence than would at first be supposed. The community which

[1] p. 151.

was served by only one railroad, instead of encouraging any system which would place it more on an equality with its rival neighbor that happened to enjoy competition, spent its whole energy either in denouncing the local rates as extortionate or in attempts to induce another line to build a connection. For instance, there was a tremendous opposition in Iowa to the combination arranged by the three great lines running across the State (known as the Chicago-Omaha Pool), and yet their own State commission warned the inhabitants of the State that, so far from injuring the local traffic, the real effect of the pool was to make the competitive traffic (in which the inhabitants of the State had no interest) pay its share of the fixed expenses and thus to relieve the local traffic of a proportionate burden.[1] The individual merchants who suffered from personal discriminations, spent their energy trying to get a more favorable rate, and in their rage at being baffled they denounced every action of the railroad managers, including the attempt on the part of the roads to eliminate the causes of discrimination. Of course, those merchants and communities which enjoyed the "advantages of competition" would make a tremendous outcry if the roads took any steps to deprive them of what was considered to be their due, viz., discriminating rates in their favor.

The more serious, and of course earnest, opposition to the combination came, however, from the great bulk of the community, that large portion of the public not directly affected by the actual discriminations. Of this opposition, we have already noted an instance in the outburst caused by the Saratoga conference; the basis of the opposition in this case was typical of the general opposition to pools and agreements throughout the country. This feeling, as tersely summed up by the former Interstate Commerce Commissioner, W. G. Veazey, is that the public has just as much interest in preventing the railroads from forming powerful and overshadowing

[1] Iowa State Report, 1883, pp. 4285–86.

combinations as it has in restraining persons engaged in industrial pursuits from banding together for purposes of gain. The opponents of pooling say, with reference to the carriers, "you transport our commodities, and we are willing that you should individually fix and charge a fair price for the service, but we are not willing to permit you to combine and by united action so adjust rates, facilities and methods of service over naturally competing lines, so, in fact, conduct the transportation business of the country as to force us, your employers, into positions of subserviency which railway commissions and courts may find it difficult to relieve."[1]

Both of these forms of opposition found expression in the Congressional debate in 1886–87, when the question as to the advisability of prohibiting pooling was decided in the affirmative. The arguments against pooling were admirably summarized by the Interstate Commerce Commission in its report for 1892. Although not in full sympathy with the views stated the commission gave a very fair and clear statement of the position held by the opponents of pooling.

Those opposed to allowing pooling contracts criticised them as conspiracies in restraint of trade, as dangerous monopolies, as "rings" and "corners." They were alleged to have the effect of giving the railroads control of the transportation, commerce, and wealth of the country, and to threaten the liberties of the people by ultimately dominating the measures and policy of the great political parties. It was asserted that such agreements were forbidden by the common law, by the constitutions of many of the States, and by a long line of constitutional decisions, that their effect was to substitute monopoly for competition, extortion for reasonable rates, and discrimination for equal treatment. It was claimed that the publication of tariffs and the uniformity of charges which other provisions of the law made mandatory would be aided in their beneficial purposes by prohibiting pooling rather than by permitting it, that pools had proven to be expensive, troublesome, and demoralizing to operating officials, and that they had often resulted in unremunerative rates between competing points, the losses from which were recouped by excessive charges at local stations. In short, the belief was entertained that the legalization of these agreements was contrary to the general policy of the proposed statute.

[1] Interstate Commerce Commission Report, 1893. Appendix D, p. 220.

Legal Status of Pooling Contracts.—Under the common law, the pooling contract was treated by the courts as "extra-legal," *i. e.*, while it was not a crime to be a party to such a contract, the courts refused to interfere if the agreeing parties did not adhere to the agreement.

The principle on which the courts based their position is brought out by Spelling, in his treatise on "The Law of Private Corporations," where he says of pooling arrangements: "Courts long ago exercised jurisdiction to regulate rates of quasi-public corporations, and on the same principle will refuse to enforce pooling contracts between railroad and gas companies. Such contracts are void as against public policy. There is substantial harmony between the English and American definitions of monopoly, the two countries agreeing that contracts entered into by and between two or more corporations, the necessary result of whose performance will crush and destroy competition, are illegal."

In spite of the extra-legal nature of the pooling contracts, which rendered them void and unenforcible by the courts, the railroads endeavored to combine. The strong popular opposition to such action caused several of the States and later the United States to pass laws making such contracts criminal.

The attitude of the individual States toward these combinations is given in Clarke's monograph on State Railway Commissions,[1] where he summarizes the railroad laws of the various States.[2] In 1891 all traffic agreements between parallel roads were forbidden by either the constitutions or the statutes of Iowa, Minnesota, Kansas, Missouri, California, Alabama (when the object of agreement is to defeat competition), North Dakota, South Dakota, Oregon, Texas, Nebraska, North Carolina, Arkansas and Nevada.

Federal Legislation Prohibiting Pools.—The traffic which was most concerned in the agreements of competing railroads was

[1] Publications of American Economical Association, Vol. VI.

[2] Table No. 4.

the through shipment which almost always passed through more than one State. In other words, the pool applied mainly to interstate commerce, over which the legislature of the individual State had no control. Accordingly the assistance of federal legislation was asked for. The Cullom Committee reported in favor of waiting for a recommendation from the proposed commission before any action be taken on so important a matter as the prohibition of pooling,[1] but the House was opposed to pooling and it carried its point. The fifth section of the Interstate Commerce Act of 1887 provides "that it shall be unlawful for any common carrier subject to the provisions of the act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such roads, or any portion thereof, and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offence." The law further provides that any officer of a corporation who arranged or aided in forming a pooling agreement shall be deemed guilty of a misdemeanor and subject to a fine not to exceed five thousand dollars for each offence.

The Sherman Anti-Trust Law of July 2, 1890, provides, in Section I, that "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is declared illegal." The status of the traffic agreement under this act was brought out in the case of the Trans-Missouri Freight Association, which elicited from the United States Courts a decision that the agreement of the roads constituting the association was illegal and void.

The lower courts had upheld the legality of the association's agreement; the Circuit Court maintaining:

[1] Cullom Committee Report, p. 200.

An agreement between several competing railway companies and the formation of an association thereunder for the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the several lines, without preventing or illegally limiting competition, is not an agreement, combination or conspiracy in restraint of trade in violation of the Act of July 2, 1890. . . . It was not the intention of Congress to include common carriers subject to the act of February 4, 1887, within the provisions of the Act of July 2, 1890, which is a special statute, relating to combinations in the form of trusts and conspiracies in restraint of trade.[1]

This decree of the Circuit Court was sustained by the Circuit Court of Appeals, that court arguing as follows:

The contracts, combinations in the form of trust or otherwise, and conspiracies in restraint of trade declared to be illegal in interstate and international commerce by the Act of July 2, 1890, entitled an act to protect trade and commerce against unlawful restraints and monopolies, are the contracts, combinations and conspiracies in restraint of trade that had been declared by the courts to be against public policy and void under the common law before the passage of that act.

The test of the validity of such contracts or combinations is not the existence of restriction upon competition imposed thereby, but the reasonableness of that restriction under the facts and circumstances of each particular case.[2]

The case was carried to the Supreme Court, which reversed the decrees of the lower courts, in a decision delivered March 22, 1897, in which the Court held:

The Act of July 2, 1890, covers, and was intended to cover common carriers by railroad.

The words unlawful restraints and monopolies, in the title of the Act of Congress of July 2, 1890, do not show that the purpose of the act was to include only contracts which were unlawful at common law, but refer to and include those restraints and monopolies which are made unlawful in the body of the act.

The term "contract in restraint of trade," as used in the Act of July 2, 1890, does not refer only to contracts which were invalid at common law, but includes every contract in restraint of trade, and is not limited to that kind of a contract which is unreasonable restraint of trade.

The policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decision of the courts and the constant practice of the government officials: but when the law-making power speaks on a

[1] From the syllabus of the decision. 53 *Federal Reporter*.

[2] Syllabus of the decision.

particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.[1]

The point in dispute, in other words, was as to what was included under the term "unlawful combinations in restraint of trade." Did the act declare to be illegal only those agreements which had been previously so considered under the common law? Or did it go further and put under the ban all combinations which had the aim of restraining trade? The lower courts held the former view, the latter was held by the Supreme Court.

This decision decrees, therefore, that "The right of a railroad company to charge reasonable rates does not include the right to enter into a combination with competing roads to maintain reasonable rates."

The Act of 1887 had declared illegal and criminal all combinations between competing railroads which maintained rates by the "pooling" device. This decision of March 22, 1897, "makes illegal" as Dr. E. R. Johnson says,[2] "all traffic associations formed by railway companies for the purpose of regulating rates charged on competitive traffic."

Evolution of Traffic Agreements Since 1887.

Upon the passage by Congress of the Interstate Commerce Act in 1887, it was necessary to alter the organization of the numerous traffic associations then in force, in order to bring them into harmony with the fifth section of the law, which prohibited pooling. That the continuance of the rate agreement and of some means of enforcing it was essential, had been learned by the roads in their years of bitter experience, with such force that the lesson was not soon to be forgotten. The associations continued in existence, therefore, and, after the

[1] Syllabus of the decision. United States v. Trans-Missouri Freight Association, 169 United States 290.

[2] Current Transportation Topics II. Annals of American Academy Political and Social Science, Vol. X, p. 246.

pool was prohibited, attempted to accomplish the same end by other means. These attempts and their results, with the extent to which the evil effects of competition were obviated by other provisions in the Act of 1887, will form the concluding subject of this chapter.

In the East.—After the passage of the Interstate Commerce Act, new articles of association were entered into by the Trunk Lines.[1] The agreement was signed on the seventh day of April, 1887, and the following preamble was adopted:

> WHEREAS, The Interstate Commerce Law, taking effect April the 4th, 1887, requires all the railroads which are subject to the law to establish, publish, and maintain reasonable and just tariffs of transportation, for both freight and passenger traffic; and,
>
> WHEREAS, The co-operation of the several railroad companies which exchange traffic with each other, and which enter into joint traffic arrangements, is necessary in order to make said tariffs, classifications, etc., conform with the law, and to avoid unjust discrimination between localities and shippers; and,
>
> WHEREAS, On account of the complicated business relations of so many railroads whose business offices are located in different parts of the country, it is desirable, in order to secure this co-operation and bring about a principal organization through which the business between the several railroad companies may be promptly and efficiently transacted, the following named railroad companies, to wit: . . . [2] and such other railroad or transportation companies in the same territory as may hereafter become parties hereto agree to form an association to be called "The Trunk Line Association," for the purpose of facilitating the transaction and interchange of business with each other and with their connecting roads, in conformity with the requirements of the Interstate Commerce Law.

The agreement thus provided, in much the same manner as had the preceding agreements, for an organization by which the roads could co-operate in the transaction of business. No method, however, was provided for the punishment or discipline of any of the members which should violate the agreement. It will be noticed that the Grand Trunk of Canada was not a member. From the date of the execution of the

[1] Report of New York Railroad Commissioners, 1887, p. xi.

[2] New York Central, West Shore, Delaware, Lackawanna & Western, Pennsylvania, Baltimore & Ohio, and the Philadelphia & Reading were the principal parties.

agreement until about the middle of November, the agreement was generally observed and rates maintained on the basis of 25 cents per 100 pounds from Chicago to New York on grain. About that time, however, the Grand Trunk Railroad lowered its rates on dressed beef, and on November 18 all the other roads lowered theirs to meet the cut by the Grand Trunk. In their report dated January, 1888, the New York Commissioners[1] expressed their "serious apprehension that this will initiate another period of unregulated competition, or, in other words, a railroad war, . . . which will result in great depreciation of property and with no corresponding benefit to either producer or consumer." That this apprehension was realized is shown by their report for the succeeding year,[2] when they say that rates "were seriously cut into by the fierce competition between the railroads."[3] This was attributed to five causes, of which the three most important were: "The clause in the Interstate Commerce Act prohibiting pooling; the reckless efforts of some railroad managers to procure business at any rates, however unprofitable; and the building of new roads in advance of any necessity for the same."[4] The commissioners state in their report that "the clause prohibiting pooling has taken away from the railroads whatever power they possessed, previous to the passage of the Interstate Commerce Act, to enforce the provisions of their joint traffic agreements as against each other."

New articles of association between the trunk lines were entered into to take effect February 20, 1889.[5] They declare in the preamble that "past experience has fully established the fact that the joint action of railroad companies is necessary to establish and maintain reasonable and just transportation tariffs on freight and passenger traffic"; and that such joint

[1] p. xii.
[2] Report for 1888.
[3] p. vii.
[4] p. viii.
[5] New York Reports, 1889, p. viii.

action is also necessary to avoid unjust discriminations in transportation charges in conformity with the requirements of the Interstate Commerce Law."

The articles were signed by the Grand Trunk as well as by the other roads. This new association seems to have been temporarily successful, if we are to judge by the following sentences from their reports for the two succeeding years, 1889 and 1890: "It can be said as peaceful relations between the trunk lines and their affiliated connections have been maintained during the past year as have ever before, or are likely to be hereafter."[1] "The trunk line agreement has been fairly well preserved throughout the year with a correspondingly stable maintenance of freight and passenger rates at fairly profitable figures."[2] The commissioners believed, however, that the diminution of ruinous competition was largely due to: "first, the very great increase of business giving all a share; and, second, the long and short haul provision in the Interstate Commerce Act."[3] The railroads certainly could not afford to reduce rates on local traffic, "that which is by far the more reliable and profitable," to a war level, and the consequence was, the commissioners argued, that all rates were kept up.[4]

The clause in the agreement to which was due the "fairly successful" maintenance of rates was Article VIII, which reads as follows:

> If the maintenance of uniform tariffs by all lines reduces the traffic of any party below a fair proportion of the traffic in competition, the tariffs may be so adjusted from time to time as to protect such lines from an unjust depletion of traffic; such adjustment to be made under the rules of this association.

The same principle was contained in the revised articles of the Central Traffic Association, which became effective December 1, 1893: "Whenever any party hereto feels that its traffic

[1] 1889, p. viii.
[2] 1890, p. viii.
[3] 1889, p. viii.
[4] 1889, p. ix.

is being unjustly depleted, it shall represent the facts in writing to the commissioner, who shall promptly endeavor to secure to the parties hereto their fair shares of traffic." [1]

The Trunk Lines were members of two associations: The Trunk Line Association, including the eastern sections, and the Central Traffic Association, including the Chicago connections. For the purpose of establishing joint tariffs, of determining divisions of through rates and fares, and of making other rules and regulations as might be necessary for carrying out the objects of the two associations, the two associations had long had a joint committee. This committee, while it may have been successful in arranging joint tariffs and divisions of through rates, had become an inefficient agent for regulating competitive traffic. According to the Articles of Agreement, it could legislate but it could not execute its decrees.

The companies composing these two associations had been trying for several years to find a more reliable instrument than the joint committee, but each such attempt was met with failure. No one believed that a permanent agency could be established, and often even temporary arrangements were violated, each road being afraid to trust its rivals. A decided movement to bring about some joint agreement between the two associations was made in the spring of 1894,[2] but without success. Then the evils of competition assumed a more prominent form than ever, until in June, 1895, according to the *Railway Guide*,[3] there was danger that all American securities held in England would be sold, and that the diminishing profits of the roads would soon culminate in widespread insolvency. This fear pervaded the owners of American railroad securities, for they brought such an influence to bear on

[1] Interstate Commission, 1895, p. 97.
[2] Railway World, Vol. XXI, pp. 636–7.
[3] Vol. XXVI, pp. 298, 450.

their directors,[1] that a meeting of the representatives of the railroads was held in the latter part of June, 1895. After numerous meetings during the summer and autumn of that year, the presidents held a short meeting in New York, on November 19, 1895, at which were adopted the Articles of Agreement.

This new organization, called the Joint Traffic Association, which went into operation on the first of January, 1896, provided for a board of managers, a permanent board consisting of one representative from each of the nine principal systems of roads. This body had the power of recommending "such changes in rates as may be reasonable and just, and necessary for governing the traffic covered by this agreement."[2] This *recommendation* was, in effect, an *order*, since it was further provided that "the failure to observe such recommendations shall be deemed a violation of this agreement."[3]

A violation of the agreement was punished by making the offending party forfeit a sum "not to exceed $5000, unless the gross receipts of the transaction in which the agreement is violated exceed that amount." In that case, the forfeiture should not exceed the gross receipts. Each road was required to make an initial deposit of $5000, as well as further monthly payments based upon the gross earnings of each company, for the purpose of providing for forfeitures and defraying the necessary expenses of the association.

Another of the duties of the managers was to secure "to each company equitable portions of the competitive traffic so far as can be legally done."[4] In order to accomplish this, it was provided that if the maintenance of uniform tariffs by all the lines reduced the tariffs of any party below a fair proportion of the competitive traffic, the tariffs should be so adjusted

[1] "Railway World," Vol. XXI, p. 124.

[2] Article VII, Section 2.

[3] Article VII, Section 2.

[4] Article VIII.

from time to time as to protect such lines from an unjust depletion of revenue.

Action was brought by the United States in the Circuit Court of the United States for the Southern District of New York to have the contract declared illegal, because, as the District Attorney maintained:

1. It provided a traffic and earnings pool, and therefore violated the Interstate Commerce Act.
2. It was a combination in restraint of trade and commerce, and therefore violated the Sherman Anti-Trust Act of 1890.
3. It was an unlawful interference with and an obstruction to interstate commerce, and therefore the United States had a good cause of action in equity irrespective of statute.

The Circuit Court and the Circuit Court of Appeals both decided that the contract violated neither the Interstate Commerce Law nor the Anti-Trust Law. The United States Supreme Court, however, overruled the lower courts and October 24, 1898, decided, in this case, as it had in the Trans-Missouri Freight Association Case, that the contract included an agreement to maintain rates and was a violation of the Anti-Trust Law.

In the South.—The Southern Railway and Steamship Association, which included most of the roads south of the Ohio and east of the Mississippi, continued in existence after 1887, although the prohibition of pooling required a reorganization.[1] The power of the association was by no means destroyed, however. Pool divisions being no longer legal as a means of maintaining rates, fines were imposed to accomplish the same end. According to Hudson, the association succeeded for some years in maintaining rates and preventing discriminations. During the panic of 1893, however, it became powerless to prevent rate-cutting, and its orders being disregarded it

[1] Henry Hudson, Quarterly Journal Economics, Vol. V, p. 90.

dissolved.[1] In 1895, it was succeeded by the Southern States Freight Association.[2] This association provided that "the principle of a physical apportionment of actual traffic subject to arbitration shall be recognized in the operation of the association," and "that the maintenance of rates as established under the rules of the association is of the very essence of this agreement." The agreement also made traffic subject to arbitration, in order to bring it within the rule of physical apportionment.[3] The decision in the Trans-Missouri Freight Association Case compelled a reorganization of the Southern States Freight Association. There are now in existence, January, 1899, two organizations south of the Ohio and east of the Mississippi—the Southeastern Freight Association and the Southern Freight Association.

In the West.—Some time after the prohibition of pools, the Western Freight Association and the Western Passenger Association came into existence to control the traffic between Chicago and the Missouri River.[4] The former of these associations enjoined upon its administrative board "the duty of securing to each party a fair share of the competitive traffic."[5] The declared object of the Western Passenger Association was "to provide for joint instead of individual action in all matters of common interest, and to afford protection against unfair competition, to the end that proper rates of fare may be maintained."[6] The Trans-Missouri Freight and Passenger Associations extended from the western limits of the "Western Associations" nearly to the western boundaries of Arizona, Utah, and New Mexico.[7]

[1] Quarterly Journal of Economics, Vol. V, p. 91.
[2] "Railway World," 1895, p. 467.
[3] Interstate Commerce Reports, 1896, p. 90.
[4] A. F. Walker, Forum, Vol. XIII, p. 743.
[5] Interstate Commerce Reports, 1896, p. 90.
[6] Ibid.
[7] A. F. Walker, Forum, Vol. XIII, p. 743.

The traffic to and from the Pacific Coast was controlled by the "Transcontinental Association."[1]

An account of traffic associations in the West would be incomplete without some mention of the Western Traffic Association, which, founded January 31, 1891, embraced most of the carriers west of the Missouri and as far south and including Arizona, Utah and New Mexico.[2] This association differed from its predecessors in three particulars:

First, its authority was derived from the boards of directors, a higher source than the presidents or traffic managers; second, it did not directly make or alter rates, but, with functions similar to those of an appellant tribunal, did so through the older associations which were still retained. The matter of a proposed change of rates by one of the subsidiary associations was taken up by the general organization at one of its regular monthly meetings. Third, where the rate committees of the subsidiary associations were unable to agree, the Western Traffic Association afforded arbitration by means of a permanent board of five commissioners.

Mention has been made in this and the preceding sections of this chapter of only the more important associations. There has been no attempt made to discuss all the organizations nor to note all the many and frequent changes which the associations have undergone. It remains only to speak in a general way of the present status of the traffic association and this recital of details will have ended.

Present Status.—The decision of the Supreme Court of the United States, in the Trans-Missouri Freight Association Case, made the agreements of all existing traffic associations illegal. Accordingly, with the exception of the Eastern trunk lines, the railroads withdrew from their old associations and reconstructed their agreements in such a way as to make them

[1] A. F. Walker, Forum, Vol. XIII, p. 743.

[2] Ibid.

conform with the principles laid down in the court's decision.[1] They retained the general form of the previous organizations, with the one important exception of reserving to the individual companies the functions of rate-making.[2] An instance of this is to be found in the articles of agreement of the Western Joint Traffic Bureau (which took the place of the old Western Freight Association), where it is provided that the board of commissioners "shall supervise and at its option recommend changes in rates, rules and regulations governing the traffic subject to this agreement." The agreement takes care to provide further, however, that "Nothing herein shall be construed as interfering with the right of individual members to change rates at will, and the board of commissioners shall so exercise the power conferred upon it as to discourage, and, so far as possible, prevent violation of the Interstate Commerce Act, or any other federal or State law, or the provisions of the charter of any member, and it shall, with these ends in view, co-operate with federal and State commissions." Similar provisions are included in the revised agreements of the other freight and passenger traffic associations.[3]

The Joint Traffic Association promptly dissolved after the Supreme Court held its agreement to be illegal.

Extent of Evils of Competition Under Interstate Commerce Law.

Discriminations Prohibited.—Federal legislation for the regulation of commerce was first considered in the early seventies, but action was from time to time postponed, on the ground that the affairs of the railway companies should be regulated by their creators, the individual States. In 1886, however, this policy was changed as a result of the decision by the Supreme

[1] E. R. Johnson, Current Transportation Topics, Vol. II, p. 98.
[2] Ibid.
[3] Interstate Commerce Reports, 1897.

Court, in the case of the Wabash Railway Company *vs.* the State of Illinois. The court declared that a State law against discrimination had no validity in respect to interstate shipments, even though Congress had wholly refrained from action upon the subject.[1] In view of this decision an especial significance became attached that year to the report to the Senate of its Select Committee on Interstate Commerce. This report summed up the necessity for federal legislation in a series of "Complaints against the railroad system of the United States." There were eighteen of these complaints, and as A. F. Walker has said,[2] "the bill recommended to the Senate might properly have been named An Act to Prevent Railway Discrimination." Its machinery and details were nearly all directed to the accomplishment of that result. The remedy proposed was the forbidding of unjust discriminations under pains and penalties. When the Interstate Commerce Act was finally passed, it contained two additional features added by the House—the long and short-haul clause and the anti-pooling clause.

The law undertook to accomplish by legal inhibitions what the railroads had been trying to do by means of pools. A brief review of the extent to which the law has accomplished its purpose of stopping discriminations will constitute the third part of this chapter on legislation.

Prohibitions of the Law Evaded.—When the law first went into operation the managers of the railways, so they claim, *accepted it as inevitable*,[3] and made serious efforts to conform to its provisions. Rebates, drawbacks, and all "other devices" whereby a carrier should receive from one person "greater or less compensation for any service rendered" than from another for a like service, were expressly declared

[1] Forum, Vol. XI, p. 526.

[2] Ibid.

[3] That the railroads "accepted the Act of 1887 as inevitable" may seem to be a statement hardly warranted by developments, but the railroads at the time of its passage undoubtedly made serious efforts to conform to its provisions. This is admitted by the Interstate Commission in its first report.

unlawful and were punishable by a heavy fine. As Walker says,[1] this was just what conservative railway managers desired; it was not only just but it protected their revenues; so the new rule was cheerfully accepted and imperative orders were issued for its obedience.

This happy condition did not continue. Before the close of the year difficulties began to develop, which in 1888 assumed very serious proportions. Where several roads charged similar rates, the traffic naturally went by the most advantageous route. The road which pursued a more indirect line, climbed heavier grades, or had less favorable terminal facilities, found that the traffic was going by the route more advantageously situated. Complaint was raised that the law was in effect "a direct interference by the government in favor of the strong roads and against the weak." The weaker roads were not managed by men who were of the kind to sit idly in their offices and lose business. They soon discovered that a commission to a shipper's friend would result in the desired freight, there being nothing in the law to prevent such commissions "to friends." Nor did their ingenuity stop here; as Walker says,[2] "other kindred devices were sugggested, some new, some old; the payment of rent, clerk hire, dock charges, elevator fees, drayage, the allowance of exaggerated claims, free transportation within some single State—a hundred ingenious forms of evading the plain requirements of the law were in use." Nor was it the minor, unimportant roads alone which thus became demoralized; shippers were ready to give information to other lines concerning concessions which were offered them, and to state the sum required to control their patronage. "A freight agent thus appealed to might perhaps let the business go at first, but when the matter became more serious and he saw one large shipper after another seeking a

[1] Forum, Vol. XI, p. 531.
[2] Ibid.

less desirable route, he was very apt to throw up his hands and fall in with the procession."

These conditions were largely due to the inadequate methods provided in the original law for its enforcement, and a remedy was attempted in the amendments which went into effect in March, 1889. For a year thereafter there was an almost entire cessation of the use of illegitimate methods of securing business, and until near the close of this period little complaint was heard.[1] Then, however, conditions assumed their old form—the malady underwent a serious relapse. According to Walker,[2] it became a common statement among shippers and traffic agents that the law was largely a dead letter, as regards the prohibition of personal discriminations, and that its penalties need not be feared.

Difficulty of Detection.—The reason for this state of affairs is to be found in the report of the Interstate Commission for 1893, where the commission admits[3] that "the difficulty does not consist in determining what constitutes the criminal act, but *in uncovering* the guilty transaction and bringing to justice those who engage in it."

The report states it to be the belief of many "that the public tariff charges are frequently departed from in particular localities, that rebates are paid, and that other prohibitions of the statute are disregarded." The commission admits this; "the legal proofs of these violations may not be obtainable, yet the fact of their occurrence is a moral certainty. How to check discriminations of this kind is a most perplexing inquiry. Unlawful contracts between shipper and carrier are consummated in secrecy, and are all the more harmful on that account. The means for their concealment are practically unlimited; the mutual interest of the parties compels each to screen and protect the other; detection is very difficult."

[1] Walker—Forum, Vol. XI, p. 532.

[2] Ibid.

[3] p. 8.

Even roads competing with the road that is offering special rates feel themselves bound to a certain code which forbids their bringing to light the misdoings of their rival. Newcomb shows the truth of this in an article in the *Engineering Magazine*,[1] where he quotes "the following extract from an article published in a periodical of high standing and wide circulation among railway officials":

> At present no railway man dares to assist the commission to information against another road. No company dares to be the active instrument in bringing complaint against another. It has its own record behind it. There would be retaliation, and (I say it with sorrow) there is no great company which can face having its record of the past years subjected to investigation.

The Interstate Commission expressed this same idea, only more broadly, in their report for 1893:[2] "The average public sentiment recognizes little moral turpitude in compacts to secure special privileges from railroad corporations and the general refusal to play the rôle of informer covers the illegal transaction with comparative security."

That the law against personal discriminations may be violated and the individual transaction so covered as to prevent any possibility of its discovery, was a fact unexpectedly brought home to the Interstate Commission in 1894. According to Section 20 of the Act to Regulate Commerce, reports are required to be filed with the commission on numerous subjects, among them being the earnings and amounts expended and for what purposes. In response to this requirement an important railroad system filed with the commission a report, verified by the oaths of its president and auditor, for the year 1893. It subsequently appeared from a statement made by an expert accountant, who made an examination of its affairs and accounts, that during the period covered by the report large sums of money had been paid out by the

[1] Vol. XI, p. 1059.
[2] p. 8.

company by way of rebates and drawbacks, but were falsely covered under the head of legitimate expenditures.[1] Under the existing law, no indictment for perjury could be predicated upon such false and fraudulent report, though made under oath.[2] If the examination of this company's books had not been made for another purpose, the existence of the discriminations would have continued undiscovered. It would certainly be impossible for the commission to examine all railroad accounts with the minuteness required to detect false entries, and the only effect of a law punishing the maker of a perjured report would be merely to make him more careful. In the case just mentioned, the reason why the accountant was able to discover the existence of discriminations, was because no attempt had been made to conceal them, the officers of the road knowing that accounts were almost never so deeply examined and that anyhow no indictment for perjury could be brought.

The commission recognized its helplessness in ferreting out evidence of personal discriminations, in its report for 1897.[3] An inquiry was made into certain rates; the investigation was conducted by members of the commission; the officers of the accused companies were called and compelled to give evidence under oath. That testimony was, without exception, that the rate had been in all cases maintained. "Nevertheless," says the commission, "there are strong reasons for believing that the fact is otherwise. Those who are in a position to know say that this is so. Railroad managers themselves, with one accord, declare it to be so. Facts which are morally convincing, although not of a character to secure a legal conviction, lead us to the same opinion. We have no doubt that at the present time very large quantities of competitive traffic are carried at other than published rates."

[1] Report, 1894, p. 63.
[2] Ibid, p. 64.
[3] 1897, p. 47.

Strong Inducement to Discriminate.—That there is a strong motive back of the special rate is doubted by no one. As the Interstate Commissioners say,[1] "The opportunity of the shipper combined with the carrier's asserted necessity is a constant temptation to bargain for preferential rates." The amount of available traffic varies greatly, while the carrying capacity of the roads is nearly a constant quantity. "Hence at different seasons of the year, or in periods of commercial depression, when the volume of shipments is greatly reduced, the strife to get business is exceedingly fierce. There are occasions where competition is so sharp, where the freight of some large shipper or combination of shippers is so needful to a particular road, that when reduced rates are demanded as the alternative of losing the tonnage the carrier can scarcely refuse."

The subordinate agent who in the early days of railway competition created such a disturbance, came to life again, with a restricted field of activities, but with an even greater desire to "get his share of the traffic." Even where the responsibility is placed in higher hands, the official, whoever he may be, is often unable to resist what A. F. Walker calls: "The persistent importunity of patrons, who beg openly, misrepresent unscrupulously, and devise ingeniously, to the end that they may get a trifle, be it ever so small, off tariff, in consideration of their patronage." "In the language of the street, 'anything goes' with shippers, from a free-pass to a greenback, from the allowance of a bogus claim to free storage, from a clerk on the pay-roll to a dinner at the club. If the facts in respect to the pursuit of personal favors and discriminations by shippers were fully known, all surprise that the law against unjust discriminations has been so extensively a dead letter would disappear."[2]

[1] Report., 1893, p. 8.

[2] A. F. Walker, Forum, Vol. XI.

Present Injurious Effects.—The conditions which give rise to discriminating special rates are such that the results have been and are of an especially unfortunate and injurious nature. The large shipper and the dishonest shipper have been and are the men favored by present conditions.

As Newcomb said, in an article in the *Engineering Magazine* of December, 1897,[1] "There is abundant evidence that concessions are regularly made to those shippers, or combinations of shippers, whose enormous wealth, or the extent of whose business operations, enable them to dictate terms to carriers, wherever alternate routes exist." The reason for this is brought out in the Interstate Commission's report for 1897, where they say:[2] "Incidentally this rate-cutting prefers the large to the small shipper. Rebates cannot be given to-day as they were before the passage of this act, nor as they were before the Brown decision[3] even. Various devices are resorted to. Only a few can know of the transaction. The whole matter must be covered up and kept secret, with the result that the large shipper, the trust, the monopoly, is able to secure the concession, while the small shipper is obliged to pay the published rates."

Another effect of present conditions which, while it may not be so harmful economically, is nevertheless most outrageous to the more optimistic observer,—the position in which the *honest* shipper finds himself. "The most unfortunate feature of the whole situation," according to the Interstate Commission,[4] "is the fact that it often prevents the honest shipper from doing business at all. It being a crime to accept less than the published rate, one who believes that the law of the land should be obeyed can not accept a reduction from that rate. It is only the dishonest trader that can and does accept

[1] Vol. XIV, p. 473.

[2] p. 47.

[3] 161 U. S. 591. This decision compels a witness to testify even though his testimony may tend to criminate him.

[4] p. 48 (1897).

it." The same effect is produced on the carrier—the present situation undoubtedly puts a premium on dishonest and unlawful methods. As the commission says[1] "It is a crime for the agent of the railroad company to give this concession in rates, and no honest man can be, on behalf of the railroad company, a party to such a transaction; so that the carrier which would obey the law is deprived of the business that legitimately belongs to it."

Summary of Present Conditions.—When the Interstate Commerce Act was first passed, it was believed that the functions performed by pools in preventing discriminating rates as regards both persons and places would be accomplished by the law. This belief, time has shown us, was not well-founded. Personal discriminations are now prevalent, and local discriminations still exist to some extent. I make this statement with great caution, although it may seem a rather sweeping assertion; the authorities are certainly almost unanimous. That the law forbidding preferential rates has been, and is being, violated, is admitted by all. As the Interstate Commerce Commission says in its latest report,[2] "Railroad men have themselves tacitly admitted that rates were not maintained; the press openly charges it; and what inquiries the commission could make led us to the same conclusion." Yet the commission is unable to prevent these illegal practices. That they exist, the commission says it knows by "facts which are morally convincing." Yet even what it so knows of cannot be eliminated because these facts are "not of a character to secure a legal conviction."

[1] p. 48.
[2] 1897, p. 47.

CHAPTER IV.

Degree and Form of Co-operation that Should be Granted Competing Railways.

Public Nature of the Railway's Services.—"A discussion of the present, practical, economic and political question—the extent and form of railway co-operation which, in the light of our past experience, should be granted to competing railways"—should be prefaced with a consideration of the economic and political position occupied by the railroad.

While transportation is undoubtedly an industry, its object being the creation of "place value," there is no doubt that its position in the industrial world is exceptional. No other industry bears such important relations to each and every other industry. Transportation figures in practically all production—the commodities in the production of which transportation does not have a share, are, if they exist at all, few in number and without significance. I think the statement could be made without exaggeration, that what coal is to the iron industry, transportation is to industry in general. In 1776, Adam Smith told the world that the division of labor, the "greatest cause of improvement in the productive powers of labor," is "limited by the extent of the market."[1] Upon the industry of transportation rests the task of removing that limitation; and most ably has that instrument of transportation, the railway, performed its task. For the removal of all limitations upon the division of labor, and for the opening up of all the resources supplied by nature, the people of the United States depend upon the railroad.

The improvement of the old means of transportation has changed the character of the relations of customer and seller;

[1] "Wealth of Nations," Book 1, Chap. III.

the railway is doing on a larger scale what the highway formerly did in a lesser degree. The railroad is the improved highway—and even if the customer pays for wagon hire as well as for use of road, the principle still remains the same. Now, this connection between the railway and its prototype, the highway, is significant, since it indicates the public nature of the service performed by the railroad. Ever since the establishment of the right of private ownership of land, there has been a public necessity for some common means of going from one place to another without trespassing on someone's property. In recognition of this necessity, the State has reserved to itself what is called the right of eminent domain, in order that when necessity arises the requisite land can be obtained with which to supply such a common means of moving person and property—the highway, in other words. The supply of this highway, in the form in which it must be used, has been long recognized as a function of the State.

In this country the State itself does not carry on this public service, but prefers to create an artificial person for that purpose. To this creature is delegated a portion of the sovereign power of the State—the right to condemn property and to take possession upon payment of an arbitrated price—and for this service of relieving the State of one of its burdens, the corporation is allowed to charge rates and tolls. Thus the duty of the State in regard to the railway is of a twofold nature: first, to the community at large, that the means of transportation shall be furnished of sufficient quantity and quality and at fair and equal rates to all alike; and second, to those who thus relieve the State of a burden, that they shall receive an adequate remuneration for so doing.

Competition Relied on in the Past to Regulate the Railway.—With the exception of certain provisions in the early charters regarding maximum rates, the State did not at first take any legislative steps to fulfill the requirements of its twofold duty. The State relied instead on the force of competition to regulate

the relations of the transportation industry, as it did of other industries. This form of regulation has failed, however, insomuch as it does not secure the execution of either of the two duties of the State; we have seen that competition resulted in:

1. Discriminations, which violate the State's duty of securing to all the use of the public service on equal terms; and,
2. Rate wars, which injure the roads, by cutting off the fair remuneration to which we have seen they were entitled, and which injure also the shipping public, owing to the fluctuating and consequently speculative condition of business.

Not only have these evils been produced by relying solely on competition as the regulator of the railway, but even this faulty regulation applies to only a part of the traffic of the country. It is a fact that cannot be denied. Furthermore competition has been found to apply to only a part of the transportation service. Not until every road is paralleled by another can we have the full regulation of competition. That every road should be paralleled would be an absurd requirement, one that is not to be for a moment thought of, and so we must accept the inevitable, that competition must remain in its present state of partial application to the railway. "Far the greater number of railway stations are dependent upon single railway lines, and the vastly larger portion of railway traffic has no alternative rates available."[1] In other words, competition applies in the first place to only part of the traffic, and in the next place it results in evils where it does apply.

The railroads devised a scheme of regulation that they claimed did away with the evils resulting from competition. But the State, fearing that by this new means of regulation the duty to see that *just* rates were charged would not be carried out, has forbidden the roads to make use of their

[1] Newcomb in "Engineering Magazine," Vol. XI, p. 1057.

device. When this prohibition was made other legislation was enacted providing for the prohibition of the evils of competition through the punitive machinery of the courts of justice. That this legislation has failed in a large measure has been admitted by practically everyone—shippers, railroads, and the Interstate Commission itself—and the country is to-day faced with the necessity of securing some means whereby the duty of the State in regard to the supply of transportation facilities may be fulfilled. Competition has failed to do so, and legislative prohibition of abuses has not brought about the desired result.

The concluding sections of this paper will consider the public expediency of allowing the railroads to use their means of solving the difficulty. In other words, should competing railways be allowed to co-operate, and, if so, what should be the form and extent of their co-operation?

Competition under the Pooling Agreement.—The evil of personal discrimination undoubtedly arises, as we have seen, from the presence of excessive competition. The force which brings about fluctuating and war rates is likewise the effort of each road to get the better of its rival in order that its rival may not get the better of it. Discrimination between places is sometimes due to rate-cutting incident to competition for traffic free to choose between carriers, and sometimes due to the rivalry of roads serving different regions, and even connecting different termini. The end of the pooling agreement is to eliminate the evils of personal and place discriminations, and this end is to be attained by doing away with one of their causes, the competition between several roads struggling for the same traffic.

A mere agreement or a mere law was long ago found to be powerless in putting an end to these evils. As we have seen, the relations of rival roads are of such a nature that the only power which can be brought to bear on these evils lies in the railway itself. So long as an individual road cares to give special rates or to declare war on its rival, it is able to do so,

and, in spite of legislative enactment, the road will do so unless its own interests require otherwise. Self-interest is man's strongest motive, and the pool recognizes this principle—that the only way to prevent discriminations and rate-cutting is to guarantee to each road its share of the traffic and thus do away, once and for all, with the inducement to discriminate.

The argument of the advocates of pools is that competition still remains in force between the several members of a pool even during the existence of an apportionment agreement. They claim that such motives as a desire to increase the allotment at the next periodical apportionment, to keep in favor with shippers in case of a break in the agreement, are still present and are an evidence that competition still exists. This contention may violate the principle on which the pool rests. Fink, Midgely and Blanchard said that the pool does away with discriminations, because it does away with the inducement to give special rates. They claim that the only way to prevent the manager of a road from giving a special rate to a large shipper in order to increase the freight hauled by his road, is to remove all incentives to do so by taking away all the advantage of rate-cutting. The advocates of pooling say competition will continue but assert that pools only regulate competition in such a way as to make it possible for the railroad companies to control discriminations. The opponents of pooling say that if competition continues pools will be a failure; and that if pools *do* succeed the public will be deprived of the influence of competition on rates. The Interstate Commerce Commission speaks in much the same vein when it says in its report for 1897 that:

It must be remembered that if pooling produces any beneficial result it necessarily does so at the expense of competition. It is only by destroying competition that the inducement to deviate from the published rate is wholly removed, and it is only to the extent that competition is actually destroyed that beneficial results can be expected. Notwithstanding the specious arguments of carriers to the contrary, this is and must be the fact.

These statements seem hopelessly contradictory. Indeed, neither side is strictly accurate in its assertion, although each is partly correct. The difficulty arises from a misunderstanding of the nature and scope of competition, and a use of the word competition in two senses.

Undoubtedly the idea at the bottom of all traffic agreements is to eliminate the competition between the several members of the pool. But the commission goes too far when it says that "it is only by destroying competition that the inducement to deviate from the published rate is wholly removed." This would require that *all* competition be destroyed by the pool, whereas in reality the only competition destroyed is that for the traffic that is free to move by way of one or more of the several rival roads forming the association. The force of competition still remains to be reckoned with. The commission, in throwing aside all competition, has fallen into the error against which we are warned by Dr. Weyl. "They have given to railway competition too local a significance and have laid insufficient, if any, emphasis on its national and international bearings." [1]

The struggle between several roads for the same traffic is only one of the forms in which competition makes itself felt as a factor in determining railway charges. Dr. Weyl goes so far as to say that such competition can never exist permanently, the sole *permanent* competition being that between roads having no territory in common. In the first kind of competition the struggle always ends in some agreement or at least understanding. Take for example the relations of two rival railways serving the same wheat-field; the competition between them may be partially or totally stifled in many ways. But the farmers of that field—say Dakota—enjoy no monopoly, and unless they can get their wheat to the world's market at a certain rate, they cannot compete with the farmers of Nebraska and Kansas. The railroad or railroads hauling

[1] Annals of the American Academy of Political and Social Science, April, 1898.

Dakota wheat to Chicago cannot afford to increase the cost of its production by charging a rate higher than is charged the Kansas or Nebraska wheat; for if they do, the marginal farmer—the farmer producing at the greatest disadvantage—will be driven out of the market and will consequently transfer his energies to the field which enjoys the more favorable transportation rates.

This competition of locality with locality—known by the railroad man as "the competition of markets"—is a far more powerful force in fixing transportation charges than are the dicta of railroad officials.[1] This form of competition is not only more powerful than that between several roads in one locality, but it is more permanent, since the industrial conditions of the world are far too complicated to admit of any understanding between the transportation agencies of the many productive centres. This competition is national and international in scope; not only does the wheat of Dakota compete in Chicago with that of Kansas and Nebraska, but the wheat of the United States competes in Liverpool with that of Canada, Russia, Argentine Republic and India. Several instances of this industrial competition are given by Dr. E. R. Johnson. The Pennsylvania and Virginia coal competes in New England with that from Nova Scotia; the various coal fields in the Alleghenies compete with each other; the Southern iron and Northern iron are competitors; in the fruit markets of our Northern States we find California, Florida and the Mediterranean countries striving to outdo each other. In fact, as Dr. Johnson says, the instances of industrial competition are so numerous and well known that it is hardly necessary to cite special cases.

Another phase of this broad form of competition is to be found in the struggle between the various possible routes connecting a given productive centre with the ultimate market of the product. This is a more complicated form of competi-

[1] Dr. E. R. Johnson, New York *Independent*, 1897.

tion than that between merely two or more practically parallel lines, as is shown by the following illustrations, which, for their aptness, I quote from Dr. Johnson: "Recently, important trunk lines have been constructed running north and south at right angles to the older routes of traffic, so that now the great region of the Central West will be able to use either the Atlantic or the Gulf ports as gateways for its export and import trade. The consequence will be that rates from the West to the Atlantic cities cannot much exceed those to Galveston, New Orleans, Mobile and other Southern ports. There is a similar instance of this competition in the rivalry of the North Central States and the North Atlantic States in the markets of the Southern States. The Central States, not having facilities for cheap water transportation to the South, are obliged by their rivals on the Atlantic Coast to secure as low rates as possible in order to compete."

Acting in conjunction with this species of competition, as an additional stimulus tending to the reduction of railway charges, we find the influence of the principle of increasing returns. This principle is based on the fact that there is no proportionate relation between gross tonnage and gross expenses. To double the gross tonnage hauled by a road means something far different from doubling the expenses. It is usually roughly estimated that the cost of railroading is made up half by fixed expenses on capital and half by operating expenses, and that of these operating expenses one-half do not vary with volume of traffic. In other words, only one-fourth of the total expense of maintaining a road is affected by an increase in traffic. Accordingly there is a strong inducement to charge lower rates if there is any hope that they will cause an increase in the gross tonnage hauled.

To understand how this principle of increasing returns works in conjunction with the competition of markets in tending to lower rates, let us consider the position of a number of roads serving a given community. Let us imagine that they

have formed a pool. They see that by charging a certain rate they get a certain amount of freight to haul; they lower that rate, increase their traffic without proportionately increasing their expenses, and the result is an increase in net earnings. It may be objected that a reduction in rates will not necessarily increase tonnage to an extent great enough to neutralize the reduction in charges. It is in answering this objection that we discover the close inter-dependence of "increasing returns" and "competition of markets." The reason why a reduction in rates will increase gross tonnage is because the industrial activity of the community affected by the reduction is stimulated by its advantage over competing communities. Each set of roads forming a pool is interested in the industrial welfare of the locality served by its members as is each road in its own particular locality. The success of the roads transporting the wheat crop of Dakota to Chicago depends in large measure on the success of the wheat industry in that particular field. It is to the interest of a railroad, or set of railroads, to stimulate as far as possible the industrial activity of that part of the country served by them, and this interest is intensified by the fact that the increase in traffic resulting from increasing prosperity can be hauled at a constantly lower rate. It is this competition between communities—a competition which, owing to the complicated character of economic conditions, cannot be restrained by any understanding or agreement—that is overlooked by the Interstate Commission when they insist so strenuously that the inducement to deviate from the published rate is wholly removed "only by destroying competition."

Possible Abuse of Right to Pool.—The supposition that competition is completely eliminated under the pooling agreement, has been the greatest cause of opposition to the pool. There has been a strong popular fear that the traffic agreement was simply a scheme of doing away with competition in order that the roads might charge extortionate rates. Let

us glance at "our past experience" to determine how far this objection has been justified by the facts, and how far the joint influence of the two factors, "competition of markets" and "increasing returns" has tended to prevent extortionate rates.

Upon an investigation of the actual working of the various pools throughout the country, one is inclined to agree with the Interstate Commerce Commission that "the actual results of the Trunk Line Association and others have been to lower rates."[1] The commission explicitly states in its first report that pools "have not enabled managers to keep rates up to former standards."

That the Trunk Line pool did not keep up rates is shown by some figures gathered by C. C. McCain, for many years the auditor of the Interstate Commerce Commission and one of the foremost authorities on transportation charges in the United States. He says[2] that the average rate per 100 pounds on freight from New York to points west of the termini of the Trunk Lines was 53.7 cents in 1878, the second year of the existence of the Trunk Line pool. In 1886, the year before the Interstate Commerce Law went into effect, the average charge for the same service was 42.6 cents. And in 1892, it was 41.5 cents. Newcomb draws from these figures the significant fact that during the period when this traffic was pooled the charges declined at the rate of 2.59 per cent per annum, but that, after pooling was prohibited, the rate of decline dropped to .39 per cent for each year.[3] However, I do not mean to suggest by these figures that pools were the only, or the chief, factor affecting rates.

The tendency of rates in the South under the influence of the Southern Railway and Steamship Association is described in Hudson's account of that association. Speaking of changes

[1] First Annual Report, p. 34.
[2] American Statistical Association, Vol. V, p. 65.
[3] American Statistical Association, p. 67.

in rates he says,[1] "Such changes as took place have been almost uniformly downward; and, as reasonable notice of these has been given, there has been no offset to the public's gain such as sudden and fluctuating rates bring. The following figures show the steady downward trend of rates, and prove at least that the effect of the association was not to maintain rates at any fixed high figures."

The rates in cents per 100 pounds on Class I from Boston, New York and Philadelphia to Atlanta fell from 170 on January 1, 1875, to 114 on January, 1887; on Class VI the fall was from 70 to 49. The decline in rates from Baltimore south was equally great.

A table showing the rates charged per ton per mile for all traffic carried by the important roads named during the years 1876, 1886, and 1894, has been prepared by Newcomb.[2] The average rate per ton per mile in cents was as follows:

	1876	1886	1894
New York Central	1.05	0.76	0.73
Michigan Central	1.03	0.69	0.67
Lake Shore & Michigan Southern	0.82	0.64	0.59
Chicago, Milwaukee & St. Paul	2.04	1.17	1.04
Chicago & Northwestern	1.95	1.19	1.08
Chicago, Rock Island & Pacific	1.91	1.07	0.99
Chicago & Alton	1.63	0.96	0.63
Louisville & Nashville	1.85	1.10	0.88
Southern Railway	3.46	1.93	1.13

The full significance of this table will be seen when we consider what was meant by each one of the years selected. In 1876 the Southern Railway and Steamship Association pool was organized; and the Chicago-Omaha pool had then been in existence for six years, while the year following saw the formation of the Trunk Line pool. The year 1886 was the last in which pooling was legal, and during the ten years'

[1] Quarterly Journal of Economics, Vol. V, p. 93.

[2] American Statistical Association, Vol. V, p. 65.

interval all the companies named were parties, more or less continuously, to pooling contracts covering portions of their traffic. The table not only shows that the average decline was much greater during the earlier than during the later period, but also affords ground for a reasonable inference that the decline was confined to no class of traffic, either competitive or local, but was distributed over the entire business of each company.[1]

The statement was made in 1897, by George R. Blanchard,[2] that "no American pool can be cited which advanced rates unless to restore unjustifiable rate-war reductions," and although this may be a little broad, I feel safe in saying this much—that I have been able to find no record of any pool which has done otherwise, and that accordingly the general tendency of traffic agreements has not been, by removing competition, to cause extortionate charges.

Objections have been raised to pools on the ground that from their very nature they were only temporary, and that when a pooling contract was broken conditions were rendered more unstable than as if the pool had never existed. J. F. Hudson[3] goes so far as to claim that nearly, if not quite, all railway wars and severe fluctuations in rates are caused by alternating periods of competition and non-competition. First no pool, then a pool, then broken, then reconstructed, and so on—this, he claims, is the very condition of affairs which leads to discriminations, rate-wars and all other evils of competition.

There may be some truth in this accusation, but we must remember that the pool was never given a fair opportunity to show its efficiency. We have seen[4] that even prior to the passage of the Act of 1887, the pooling contract was not

[1] Newcomb, American Statistical Association, Vol. V, p. 63.

[2] New York Mail and Express, May 15, 1897.

[3] "Railways and the Republic."

[4] p. 58.

legal but only extra-legal. The standing of the pool before the common law was similar to that of the gambling contract, while it was not made a crime to agree to such a contract, the courts would refuse to oblige any of the parties to obey its provisions. This being the standing of a contract, there was a constant temptation on the part of one or the other of the roads to violate the agreement; each road, knowing that the others could break the contract as soon as they so desired and without any penalty for so doing, became suspicious of its rivals and was very hasty in believing reports of such violations. This was the great weakness in the Southwestern Railway Rate Association—that, as Midgely testified,[1] it depended solely upon the honor of members. Each manager knew that he could not go into court and sue for balances withheld from him; hence there was a constant distrust, lest, when any member should be called upon to pay over a large amount, he would refuse, and a disruption ensue. This weakness was also present from the first in the Southern Railway and Steamship Association, but there the difficulty was obviated in part by the system of deposits and forfeits which was soon afterwards adopted. Taking into account this extra-legal nature of the pooling contract, one cannot fail to agree with the statement made by Midgely; when speaking of the necessity of legalizing such contracts,[2] he says: "Until that result is reached, apportionment schemes, however well devised, will have but a precarious existence and an imperfect trial." In fact, the fairness of this position, which Midgely took in 1879, is recognized by the Interstate Commission in their report for 1897 when they say:[3] "Pooling in this country had not been tested previous to the act under such circumstances as to make its success or failure then a fair criterion of what legalized contracts of that sort might accomplish."

[1] Report on Internal Commerce, 1879, p. 58.
[2] Ibid.
[3] Report for 1897, p. 49.

It is obviously unfair to judge of an experiment when made under imperfect conditions. Nor should we judge of the pool by any weaknesses which it may have shown in the early part of its development. Such an authority as Hadley[1] has made the statement that "Pools were better administered in 1880 than in 1877, and better in 1886 than in 1880." This is only natural when we consider that at first pools were only experiments. Their natural evolution resulted in an improved form. So to be perfectly just in forming an estimate of the apportionment agreement, we should consider it only in its most recent form, and then allow for the weakness due to its unenforcible character in the courts.

There have been certain abuses connected with the pool that have stirred up what is an undoubtedly just indignation. The methods employed by the Southern Association to discipline unruly members and to force into the agreement certain recalcitrant roads, were certainly not altogether above-board. One of the roads forming the Colorado pool has become famous for its attempt to prevent the construction of a new road which would compete with another member of the pool; the method employed was a point-blank refusal to haul the necessary construction material. To permit such action would be most unwise and uncommendable on the part of the community, and, indeed, under existing law, a road which thus refused its services would be promptly set right.

Necessity for Regulation of Pools.—Although the objections to permitting pools can be smoothed away, the community should never forget that even in thus allowing the roads to destroy such competition between the several parties to the agreement as a pool can eliminate, a force that has exercised a potent influence in the past on the charges and services of the railways will be destroyed. I cannot agree with the Interstate Commission[2] that "by the legalizing of pooling the

[1] New York Mail and Express, May 20, 1897.

[2] Report, 1897, p. 49.

public loses the only protection which it now has against the unreasonable exactions of transportation agencies," for even under a perfect pool there would exist strong competitive and other influences to prevent extortionate practices. But I nevertheless believe that an important rate-influencing power would be removed by the permission to pool.

The history of pools may not show any examples of extortion, or of abuses which cannot be accounted for, but that is not a sufficient reason for placing such a vast power in the hands of the railroads as an *unlimited* right to pool would give them. It was in recognition of this fact that the Interstate Commission said in 1894:[1] "Pooling without other remedial legislation is, we think, unadvisable. Pooling under proper conditions to be approved by the commission and rendered capable of easy and direct regulation, with accompanying effective remedial legislation, we believe might safely be tried." In other words, we find the commission in 1894 expressing itself as in favor of trying pools, if at the same time such legislation were provided as would prevent any of the possible incidental abuses of the right to pool. This same view was upheld by the commission in their report for 1895, when they said:[2] "While the commission is impressed with the evils attending the present system of competition, often resulting in unequal rates and unlawful practices, and concedes that the practical results of that system upon the railroads and the public are unsatisfactory in many respects, it nevertheless believes that the re-establishment of pooling without adequate restrictions and further remedial legislation would be unwise." The commission's reason for believing that to do so would be unwise, was that without such legislation "it would be in the power of the combination to charge excessive rates for the transportation of staple commodities and necessaries of life, and thus to deprive the people of the benefits arising from the

[1] p. 63.
[2] p. 101.

competition which now exists." In their report for 1897, the commission take the same ground, when they say[1]: "In view of the whole situation, a majority of the commission would be inclined to recommend that the experiment (of legalizing pooling) be tried if suitable safeguards are provided. We are all agreed that the enormous power which such a measure would place in the hands of railroad companies ought not to be granted, unless the exercise of that power is properly restrained in advance."

Form of Regulation.—This certainly seems reasonable enough ; the only difficulty to be solved is in regard to the exact form which regulation should take. It is one thing to say that competition has resulted in evil and therefore we should allow pools, which, however, should be regulated in order to prevent possible abuse, and it is entirely another thing to prescribe the limits within which the regulating is to be applied.

In their report for 1895,[2] the Interstate Commission suggest, as an adequate substitute for the safeguards which competition is supposed to afford, the regulation of rates by the commission. To this end, they believed it would be necessary that the rates established by the combination should be subject to effective control by the commission. This exercise of authority would be justified, they claimed, by the fact that it is in the nature of a condition upon which the government grants to certain corporations the privilege of forming a combination or limited monopoly. Such a grant would constitute an exception to the general policy of the federal laws prohibiting trusts and combinations in restraint of trade. Conditions have always been attached to government grants of monopolies and special privileges. The railroad corporations in effect represent that their business is of such a nature that, if subjected to the restrictions upon combination which the policy of the

[1] 1897, p. 49.
[2] p. 101.

law imposes upon other kinds of business, the result will be destructive to themselves and injurious to the commercial interests of the country; and they ask to be relieved from the effects of this policy, and that an exception be made in their case because of the exceptional character and relations of public transportation.

While regulation of rates by the commission would undoubtedly be justified according to this line of reasoning, a difficult problem still remains to be solved in determining how this regulation shall be actually administered—what form shall it take and on what principles shall it act? The Patterson bill, in 1894, answered this question by providing a system whereby all pooling contracts should be obliged to receive the sanction of the commission before becoming legal. This bill proposed to amend Section 5 of the Act of 1887, by declaring pools unlawful, unless they conformed to the following conditions: "Every such contract shall be in writing and filed with the commission created by this act, and shall become lawful and enforceable between the parties thereto at the expiration of twenty days from the filing thereof, unless the commission shall, upon inspection thereof, make an order disapproving the same: and it shall be the duty of the commission to make such order of disapproval whenever, upon such inspection, it shall be of opinion that the operation of any such contract would result in unreasonable rates, unjust discrimination, inferior service to the public, or otherwise contravene any of the provisions of this act." In other words, a pooling contract was to be submitted to the commission, which had authority to disapprove any contract that would produce undesirable results. Nor did the commission, under this bill, give up its supervision over a pool which had been once approved. It was further provided that the commission should "observe the working, operation, and effect of every such contract upon the transportation and business of the country and of the several contracting parties;" also that it should

"investigate all complaints relating to the rates, charges, facilities, or practices maintained by or under any such contract," and when any of these were found to be "unreasonable or excessive, or to result in any unjust discrimination," the commission was to "issue an order requiring such rates, charges, facilities or practices maintained by or under such contract, to be changed," or, if necessary, to disapprove the contract itself. All findings of the commission disapproving such contracts were to be subject to review by a circuit court of the United States, the burden of proof to fall on the railroad company, while the commission should be a party defendant.

This bill, while it undoubtedly covered all the main points, was expressed in general terms and thereby possessed a weakness which might have been cured by a little more explicitness regarding the exact nature of the contracts to be disapproved. Another weakness of the bill was that it did not provide for any appeal in case the commission approved a pool to which individuals had objections. It seems to me to be only just that, if the railroads are to have the right to appeal to the United States Courts from an unsatisfactory decision, the same privilege should be accorded to any who might believe to be objectionable a pool which the commission had approved.

The Cullom bill, introduced in the Senate in 1897, provided that pools should be lawful only after their approval by the commission; that the contract should be for a term not to exceed five years, and should name the maximum and minimum rates to be charged by the common carriers parties to such contract. The duties of the commission as set forth in this bill are similar to those of the Patterson bill, except that the following more explicit wording is used: "to observe the working, operation, and effect of every contract . . . upon the transportation and business of the country, . . . making such examinations and investigations in relation thereto as the commission may deem necessary, and to investigate all

complaints relating to the rates, charges, facilities, or practices maintained by or under such contract." It is further provided that "whenever the commission, after due notice and reasonable opportunity to be heard, shall find that any such rates, charges, facilities, or practices are excessive or unreasonable, or result in any unjust discriminations as between individuals, localities, or articles of traffic, . . . the commission shall issue an order requiring such rates, charges, facilities, or practices maintained under such contract to be changed, modified, or corrected," as may be necessary, or shall even disapprove and annul the contract altogether. The Patterson clause providing for appeal to United States Courts is practically reinserted in the Cullom bill. The same weakness is apparent in allowing only the roads to appeal in case of an adverse decision by the commission.

If an amendment embodying the change just suggested were made to the bill presented by Senator Cullom in 1897, it would, in my opinion, afford the necessary safeguards against an abuse of the right to pool. The shipping public is just as much interested in a decision by the commission as are the railroads, so I would advise that all interested parties be given that right to appeal which Senator Cullom would grant only to the railroads. Of course the idea of the Cullom bill was that the interests of the shipper would be looked after by the commission—that the commission would not approve a pooling contract which violated the rights of the shipping public. This, however, gives the investigations by the commission a wrong status, the commission becomes the advocate of the public against the railroad. The status of the commission should be that of an impartial tribunal, looking equally to the interests of all concerned. Both the shipper and the railroad company should be given equal right to appeal from a pooling decision of the commission to a higher tribunal. This amendment might secure only negative results, but even as such the results would be of importance.

Summarized briefly, my recommendations as to the form of regulation which should be adopted by this country to prevent any abuse of the permission to pool are as follows: Contracts apportioning traffic among competing roads should be unlawful except when approved by the commission; that body should have authority to alter or reject altogether contracts submitted to it, and an appeal should be allowed from its decision to the United States Courts, such appeal to be taken by either the railroads or any other interested party. Further, the commission should keep a strict watch over the operation and actual workings of the pool, and if any abuse such as discrimination between persons or places should creep in, the proper steps should be taken for their elimination, the pool being utterly annulled if no other way could be found by which to do away with the evil.

To adopt such a plan of regulation would undoubtedly put a tremendous power into the hands of the commission, but it seems to me that a safeguard has been provided in the generous appeal-rights given to all interested parties. Some advocates of pooling have gone so far as to object to the supervision of such contracts by the commission, because it would give that body too great an influence. As T. J. Greene, one of those who holds this view, has said, the commissioners would be given indirectly "a tremendous power."[1] But to grant the railroad what he advocates, the right to pool without any supervision, would be a more injudicious step than the adherence to our present policy. I heartily agree with the vigorous language used by the Interstate Commission in regard to this matter in the report for 1897:[2] "The members of the Interstate Commerce Commission wish to say in the strongest possible terms that they are unanimous in the opinion that to overturn the Trans-Missouri decision, to repeal the fifth section and enact in its place a pooling bill, thereby permitting and

[1] Nation, December 15, 1892.

[2] 1897, p. 50.

inviting unlimited combination between carriers, would be little better than a crime against the people of the United States, unless this tribunal, or some other tribunal, is at the same time invested with adequate powers of control."

To grant the permission to pool, even with a strict system of regulation, may seem to many to be a radical step possessing the characteristics of a blind experiment. It seems to me, however, that the radical step was taken in 1887, when, instead of adopting the recommendation of the Cullom Committee that the matter be left undecided until a report could be obtained from the new commission, or instead even of taking the moderate step of providing for regulation, Congress blindly prohibited all pools. It is not too late now to give the country a fair trial of the pooling system under proper regulations, and Congress should take appropriate action to that end.

SOURCES OF MATERIAL AND BIBLIOGRAPHY.

The information contained in this paper on "Railway Co-operation" has been obtained in general from three sources: governmental and railroad reports, text-books, and periodical literature.

The most important source has been the body of reports prepared by the federal and State governments. First in importance come the reports of the Congressional Committees: Windom in 1874 (Sen. Rep. 307, 1st Session, 43d Cong.), Reagan in 1878 (House Rep. 245, 2d Session, 45th Cong.), and Cullom in 1886 (Sen. Rep. 46, 1st Session, 49th Cong.); and the report of the New York Legislative Committee, the "Hepburn," in 1879 ("Proceedings of the Special Committee on Railroads," New York Assembly, 1879).

The Annual Reports, beginning in 1877, on the Internal Commerce of the United States, prepared by Joseph Nimmo, chief of the Bureau of Statistics, have furnished a valuable contemporary view of the railroad situation as it developed from year to year. The reports of the various State railroad commissions, especially those of Massachusetts, New York and Iowa, have been valuable for a similar reason, though necessarily more local in scope. The annual reports of the Interstate Commerce Commission have formed the best source of this kind since 1887. Under the head of reports would also come those of the individual railroads, of which I have used especially those of the Pennsylvania, the Baltimore & Ohio, and the New York Central.

Next in importance to these original sources have been those various scientific compilations which, for want of a better name, I call the text-books. Under this head I would include a number of works which vary greatly in value and reliability. Those used most frequently have been Professor Hadley's valuable work on "Railroad Transportation" (1885), Van Oss' "American Railroads as Investments" (1894), Charles Francis Adams' "Railroads: Their Origin and Problems" (1878), Dabney's "Public Regulation of Railways" (1892), and Stickney's "Railroad Problem" (1893). The less important works consulted have been Hudson's "Railways

and the Republic," Ringwalt's "Development of Transportation Systems in the United States," McCain's "Compendium of Transportation Theories," Larrabee's "Railroad Question," Dos Passos' "The Interstate Commerce Act," and Cook's "Corporation Problem."

A very valuable mass of material has been found in the numerous articles in the periodicals and magazines, of which I give a list of the most important:

HUDSON: "Southern Railway and Steamship Association;" *Quarterly Journal of Economics*, Vol. V.

CLARKE: "State Railway Commissions; Publications of the American Economic Association, Vol. VI.

HADLEY: "Railroad Pools;" *Quarterly Journal of Economics*, Vol. IV.

JOHNSON: "Industrial Services of the Railways;" *Annals of the American Academy of Political and Social Science*, Vol. V. "Relation of Taxation to Monopolies;" *Annals*, Vol. IV. "Current Transportation Topics" (I and II); *Annals*, Vols. IX and X. "Monopoly and Competition in Railway Charges;" New York *Independent*, second issue of September, 1897.

TAUSSIG: "Contribution to the Theory of Railway Rates;" *Quarterly Journal of Economics*, Vol. V.

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BLANCHARD: "Prohibition of Railroad Pools;" *Forum*, Vol. X.
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VIRTUE: "The Anthracite Combinations;" *Quarterly Journal of Economics*, Vol. X.

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The recent history of the traffic associations before the courts has been found in the following legal references:

United States *vs.* Trans-Missouri Freight Association *et al.*: 169 U. S. 290.

Decision of this case by the Circuit Court is in 53 Fed. Rep. 440, and the decision of the Circuit Court of Appeals is in 19 U. S. App. 36 and 24 L. R. A. 73.

The Briefs of Counsel in this case contain a valuable discussion of traffic associations and railway co-operation.

United States *vs.* Joint Traffic Association *et al.*: 171 U. S. 505. Consult also:

Decision of the Circuit Court.

Decision of Circuit Court of Appeals, and

Briefs of Counsel.

Numerous other miscellaneous sources have been utilized to a greater or less extent, such as the Congressional debates, and the testimony and investigations of specialists. Under the latter head would come Blanchard's papers on "Railway Pooling," the *Mail and Express* (May 8, 11, 13, 15, 18, 20 and 22, 1897); the writings and testimony of Albert Fink in regard to the Organization of Pools, Differential Rates, and Legal Status of Traffic Associations; and the Thurman, Washburne and Cooley "Report on Differential Rates to the Seaboard."

Railway Co-operation in the United States.

BY

WILSON STILZ.

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PART I.

The Evolution of Railway Co-operation in the United States.

I. Co-operation of Connecting Lines to Promote Through Traffic.

§ 1. Railway co-operation made its first appearance in the United States about the year 1850 as the result of a demand for improved facilities in long-distance transportation.

Prior to that time, our railroads had been built mainly to meet local needs, to connect neighboring towns, to tap the coal fields, or to supplement water transportation. The concept of long-distance through traffic had not as yet attained dominating importance, and, therefore, though the short, local lines not infrequently formed a continuous series, no need was felt, and no attempt was made, to connect their termini. By the year 1850, however, the social and economic development of the country had resulted in the beginnings of a considerable through traffic that at once made apparent the defects of existing conditions. Passengers vigorously protested against the inconvenience and delay of having to go from the terminus of one road to that of another. They demanded a rail connection and whatever else might be necessary to obviate change of cars and to secure the desired facilities for a long journey. Shippers made a like demand on the ground that freight was lost or delayed in transfer from road to road, to say nothing of the cost of repeated loading and unloading.

The smoother and more rapid working of through traffic was, moreover, at least equally desirable from the standpoint of the carriers themselves. Connecting lines saw that they had everything to gain and nothing to lose by developing long-distance traffic; for local receipts were evidently in nowise

diminished thereby, and every through passenger or through consignment was a source of net gain. The interests of the railroads, therefore, served but to supplement popular needs in making desirable the improvement, or rather the inauguration, of a through service.

For the railroads to furnish this requsite, one of two things was necessary; either the short, consecutive lines must reorganize as a single company, or they must enter into some sort of an agreement with respect to the many things requiring common consent and mutual aid. In other words, the carriers had the choice of co-operation or consolidation, and in practice, made free use of both expedients, though perhaps the latter is the more typical of railway policy in the early fifties. But whether such be the case or not, is of no significance for us, as it remains unquestionably true that however prevalent the plan of consolidation, co-operation was also much resorted to, and that joint railway activity thus began about 1850.

The need of harmony between connecting lines was so evident that every nerve was strained to secure this form of co-operation. The termini of local roads were connected, a uniform gauge adopted, and time-tables arranged so as to avoid unnecessary delay at what might now indeed be called "junctions." Stoppages for meals, baggage privileges, passenger and freight rates, liability for damage or loss—these and countless other questions, newly recognized as of common interest to connecting lines, were settled by co-operative effort. Thus the public were quickly provided with every facility for through traffic that it was in the power of our carriers to furnish, to the advantage of the railroads as well as of the community at large.

§ 2. The form of railway co-operation which we have so far considered cannot be regarded as having ever constituted a part of the railway problem, if by "problem" we mean a question either of uncertain answer or with marked difficulties

in the way of solution. Neither doubt nor opposition has ever limited the efforts of our carriers to promote the freest interchange of traffic between connecting lines. Were there no other object for co-operative endeavor, the present paper would be of the briefest, or else would of necessity consider the most technical details of interline organization. We are denied either alternative, however, by the presence of another phase of co-operative activity, namely, that which has for its object the restraint of competition. Joint effort of railway companies to this end has for thirty years been a much disputed question and one upon which almost endless discussion is possible. To this later development of co-operation, therefore, our attention will be almost wholly confined; so that, for the sake of simplicity, it may be well to consider at once the few points of interest connected with co-operation of connecting lines, even though chronological sequence would defer their treatment to a subsequent portion of this paper.

§ 3. First of all, we should notice in passing that the public has not remained content with a merely negative attitude toward co-operation of connecting lines. Congress felt it necessary as early as 1866 to authorize railroads chartered by States to engage in interstate commerce, and to connect with roads of other States so as to form continuous lines for that purpose. True, this act does not furnish any positive encouragement to interline co-operation, but it does show that through routes were already of sufficient importance to call for Congressional action to remove all doubt as to their legal sanction. It was not until twenty years later that legislation upon this question was again demanded; for our carriers continued to promote the smooth workings of long-distance traffic without other spur than that of self-interest. By 1887, however, Congress felt that more positive action must be taken. In accordance with this view, the Interstate Commerce Act not only declares unlawful all combinations or agreements to prevent continuous shipment, but also goes on

to state that "common carriers subject to the provisions of this act shall . . . afford all reasonable, proper and equal facilities for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines." Now, inasmuch as the only way for separate companies to furnish "all reasonable, proper and equal facilities" for through traffic over their connections is by co-operative action, the above clause means in brief, that whether they so desire or not, connecting interstate carriers are ordered to co-operate, in every reasonable way, for the most efficient organization of the through service. Evidently railway self-interest was no longer relied upon to furnish satisfactory co-operation of connecting lines, and we see from subsequent statements of the Commission that this distrust was justified. In every report of the Commission since 1888, it has been urged that the law as above stated is not enforceable, and that this fact constitutes a serious defect, properly to be eliminated by amendatory legislation. It is alleged in the report for 1897, for example, that the importance of a really effective amendment, giving the Commission full power to enforce the through traffic clause, "is more and more deeply impressed upon us by frequent complaints of the denial, both to carriers and to shippers of the reasonable, and from a commercial standpoint often necessary facilities of through routing and through rating."

In the light of such a statement, the accuracy of which we are not justified in questioning, our former assertion that co-operation of connecting lines is no part of the railway problem, may seem at first sight scarcely accurate; but the error is only apparent. Refusal to make arrangements for the promotion of joint through traffic has indeed been frequent, but not because of any new-born opposition to such an arrangement *per se*. Whenever our carriers have really been open to the charge of blocking through traffic over connecting lines, the

blame is due to competition,—more or less direct,—between the companies concerned, and not to a concept that such traffic is no longer desirable. It is always as a competitor and not as a connecting line that one railroad refuses another the proper facilities for interchange of freight and passengers. Unfortunately the ways in which competition may become a factor in determining the relations of connected lines are legion, and we can look for efficient co-operative efforts in through routing and through rating only in and after complete solution of the problem of railway competition. Perhaps it is not amiss to illustrate the actual working of interline rivalry as interfering with harmony of connecting roads.

In 1897, for instance, the following case was noted by the Commission: The only available route for coal from Newburg, N. Y., to certain points in Connecticut was in part over the New York, New Haven & Hartford Railroad, and in part over the New York & New England Railroad. The former refused to co-operate in forming a through rate, however, because under such a rate the joint route from Newburg to Connecticut *would compete* with the coal traffic wholly over the New York, New Haven & Hartford Railroad from Jersey City directly to the Connecticut markets. The haul from Jersey City meant more to the New York, New Haven & Hartford Company than did *its share* of a joint haul from Newburg, and indirect competition thus became the basis of a refusal to co-operate with the New York and New England Railroad.

The above instance is but typical of the influence of interline rivalry upon agreements and co-activity between connecting railway companies. As already stated, therefore, any hesitancy on the part of our carriers freely to form joint through routes, is entirely the result of railway competition; and although the public has felt it necessary in some degree to urge greater co-operation between connecting lines, we must not thereby infer that co-operation is in itself a more

complex question than at its first beginnings in the early fifties. On the contrary, in so far as there is any problem involved, it is the problem of railway competition; and the fact that railway co-operation is not quite satisfactory as between connecting lines,—the fact that a negative attitude of active popular opinion is no longer predominant,—deserves mention, but not lengthy discussion.

§ 4. A second, though minor point of interest in connection with the handling of joint through traffic, is the fact that a considerable share of this work has been done, not by the railroads directly, but by separate organizations.

This development was in every case a natural result of existing conditions, and, in its beginning at least, an unquestioned economic advantage. The express company, the fast freight line, the company to furnish specialized forms of passenger coach—each from the start performed its particular type of service for many roads. No one of our carriers could have organized an equally efficient service at like rates, nor was it practicable to form a jointly managed company. Co-operation had not yet reached the point where the latter course was expedient, nor had consolidation advanced sufficiently to make the former a financial success. The only feasible plan to secure the best freight and passenger service therefore, was the one adopted; though it may be, as many claim to-day, that our railway system is now sufficiently developed for our carriers successfully to undertake the functions at present exercised by outside organizations. Whether this be so or not, however, it remains true that in the past the passenger coach, express and fast freight companies, organized separate from any railroad, have to some extent lessened the necessity for direct co-operative action between connecting lines. The point is of interest rather than of importance, however, and without dwelling thereon at greater length, let us turn from that phase of co-operative activity which, though the first to arise, has never attained the doubtful honor of becoming a railway

problem, and view that other form of interline effort that has been so marked a subject for popular dislike and railway favor ;—namely, co-operation in restraint of rate competition.

II. Co-operation of Competing Lines to Restrain Rate Competition.

§ 1. It may be well to state at the outset that the several parts of the railway problem are practically a unit, and that no one question can be isolated and dealt with by itself. The kaleidoscopic changes of railway policy and public opinion toward co-operation in restraint of competition must, therefore, be considered to some extent in the light of contemporaneous thought and action in other fields of the railway problem. Though the effort will be made to restrict our discussion as much as possible directly to the problem of co-operation, by far the greater space must of necessity be devoted to subjects that would, in a categorical list, appear utterly irrelevant. With this thought in mind, therefore, we are ready to take up the problem of railway co-operation—to trace its evolution, to analyze its nature, and to offer some suggestions for its solution.

About twenty years had passed since the first appearance of railway co-operation, before it became in truth a great problem ; and, as already intimated, the sudden and lasting importance of this question was not the result of any gradual growth or development of such joint efforts as we have so far considered ; but was due entirely to its entrance upon a new field. So long as co-operation was merely a means to facilitate through traffic, popular approval was not withheld ; but when, in the later sixties, it was discovered that competing roads were utilizing the rate agreement and pool to prevent a reduction of charges through the force of interline rivalry, then co-operation seemed arrayed against all "free competition" and in such guise aroused instant and bitter condemnation.

About 1870, then, there began the problem of railway co-operation that has since been ever present, for throughout the last thirty years, interline efforts in restraint of competition have been a constant and fruitful source of dispute between the carrier and the community at large. It is rather too comprehensive to speak of this period as a whole, however, for the success of railway restraints upon competition, the nature and intensity of public opposition thereto, and the relation of the whole problem to other railway questions, have varied considerably from time to time. To subdivide this period, therefore, and to treat of the broad characteristics of each minor division in contrast with the others is to promote a clear understanding of the changes mentioned.

The difficulty in this method is to determine just when there has occurred a decided alteration in the relations of public opinion and railway practice. So gradual have been the changes that it is practically impossible to assign any definite date to their occurrence. All that we can do, therefore, is to take such convenient landmarks of railway history as can, with nearest approach to accuracy, be used to bound a period differing from others in its aggregate of predominant features. In this broad and general meaning of the term, the following "periods," covering the evolution of co-operation as a problem, will be taken up in successive order: (1) the decade from 1867 to 1877—the "Granger" Period, ending with the Supreme Court decision establishing beyond dispute the legal right of governmental control over railroad rates; (2) the decade from 1877 to 1887—testing the more permanent results of Granger agitation, and ending with the passage of the Interstate Commerce Law; (3) the decade from 1887 to the present.

The Period From 1867 to 1877.

§ 2–A. The first period is one of extreme importance, marking, as it does, the beginnings of co-operation between competing lines and of public hostility thereto. The years from

1867 to 1877, corresponding roughly to the time of the Granger excitement, are made a distinct division of our subject because of the close connection between the new co-operation and the Granger agitation. The intimate relations of these two questions can be more clearly shown, and will be better appreciated, after some attention has been devoted directly to the causes, development and ultimate results of that wave of popular antagonism and legislative coercion in our railway affairs, broadly known as the Granger movement. To this movement, therefore, let us turn.

The five or six years preceding the panic of 1873 were a period of rapid railway growth. In the middle and far West the construction of new lines was especially marked, and differed from previous development in that the railroads became distinctively the pioneers of civilization. Tracks were laid through and into regions almost devoid of population. They were laid, moreover, with full knowledge that practically no traffic could be expected under existing circumstances, capital expended in such projects looking to a distinctively future return. That surplus Eastern wealth actually took these chances is largely due to the general fever of speculation following the war, but largely also to the special inducements held forth by our Western States and Territories to encourage railroad building. Settlers in these regions were for the most part either pioneer farmers or professional "boomers," and whether seeking to support themselves by agriculture or by wildcat banking and land deals, a direct transportation route to the East opened up visions of unlimited prosperity. The railroad was thought to be a very Midas, whose touch would turn all things to gold.

By this exaggerated concept of railway usefulness, our Western States and Territories were led to make most lavish grants of land, bonds, and privileges to railroad companies laying tracks within their respective borders. This competition of different States and Territories was duplicated between

smaller sections of the country. The people of different localities within a State strove to outbid one another in secret or open inducements to cause a prospective road to pass through their particular town or county. Naturally when the railroads did come they accepted this public appraisement as indicative of their true worth, and conducted themselves accordingly. Believing that the public was utterly dependent upon the carrier, and striving above all things for a quick return on invested capital, railway managers not only fixed rates at an exorbitant figure, but in other ways as well used their great power unsparingly. Towns were forced to grant greater privileges under threat of changing the road's location; lobbying was freely resorted to; judges and executive officers of the State and members of the legislatures were given free passes; caucuses were packed, and laborers in construction gangs were compelled to vote as the "boss" directed.

Of course the public deeply resented the domineering conduct and corrupting influence of the railroads in general, but the rate question was above all else the point of decided friction between the companies and the people at large. Indeed, this has ever been the case, for it is in the matter of fares and freight charges that the individual is brought into most direct contact with our transportation agents. Not until a man is satisfied that he pays no more, and that his neighbor and competitor pays no less, than a just and reasonable rate, will he turn his attention very strongly to matters of less direct personal concern. Only after this all-important rate problem is adjusted with some degree of satisfaction to the public, will that body concentrate its attention very vigorously upon the solution of less pressing railway questions. It is scarcely surprising, therefore, to find that throughout the entire history of popular opposition to railway policy, the rate question has constituted, in one form or another, the chief source and field of conflict. In Granger days, however, greatest emphasis was laid upon a phase of the rate problem that has not been very

prominent in subsequent periods; for popular hostility and popular effort were directed against an abuse that no longer exists, namely, extortion in railway charges.

As already stated, our Western carriers had indeed fixed their rates at an exorbitant level in order to obtain an immediate net return from a region of comparatively sparse settlement, and the public now undertook to force a reduction of such transportation charges.

At first it was thought that railway competition would be an all-sufficient means to the end desired, and in this belief every effort was made to duplicate existing lines; but it soon became evident that no considerable relief was to be obtained from such a course. To begin with, it was not possible to parallel every mile of road already built, and so long as any points lacked the active competition afforded by the presence of more than one carrier, rates were there raised to counterbalance, in part at least, their reduction at competitive centres. Nor did the latter reap any real benefit from interline rivalry, for though rates were thereby lowered, competition greatly increased the evil of personal discrimination. Of course it was the larger shippers who received the lower rates, and, therefore, the increased aggregate wealth of competitive railway centres was not an unmixed blessing, since it was accompanied by a greater disproportion in the distribution of property. On the whole, then, while railway competition did somewhat reduce the average of rates, the public felt that tariffs were still excessive and that other abuses in railway methods were on the increase.

A lessened transportation charge seemed at this time more than ever desirable. The fall in prices that preceded the panic of 1873 was already being felt in our agricultural regions. Wheat, the great staple of the West and Northwest, had for some time been subjected to a steady decline in market value, and the farmers of the wheat region saw ruin staring them in the face. The one hope of escape lay in reducing

the cost of production, and transportation charges being the most conspicuous as well as one of the largest elements in cost, we can scarcely wonder at the excited popular demand for a reduction of freight rates. Moreover, public feeling was intensified by an erroneous belief that the railroads were making an enormous and extortionate profit. It was argued that no carrier would transport a given consignment of freight unless the return for such a service was to some extent remunerative. The lowest competitive rate was, therefore, assumed to be "paying" the road that offered it, and upon this principle was based the conclusion that all non-competitive charges, in so far as they exceeded rates to "common" points, were pure extortion. Although this concept of the situation was utterly fallacious,—as we shall see when we discuss the nature of railway competition,—the public at large did not realize that fact, but considered that common justice as well as their own needs called for the immediate reduction of transportation charges. Competition having failed to accomplish this result in its desired completeness, legislation was essayed.

About 1870, therefore, we find that constitutional conventions and State and Territorial legislatures, though commencing to deal with many railway questions, are engaged primarily in an attempt to solve the problem of extortion, and either prescribe maximum rates by direct law or create a State Commission and vest in it full authority to regulate charges. The former method was pursued by Arkansas and Ohio in 1873, and by Iowa and Wisconsin in the following year. Michigan had taken this course in 1871, after a constitutional amendment of 1870 authorizing such action, but in 1873 changed over to the commission plan. Direct legislation on rates had begun in Minnesota also in 1871, but here, too, this scheme was found to lack elasticity, and was abandoned for commission regulation three years later. Illinois had a commission from the outset of her Granger legislation in 1871. Several other Western States, and some in the South, at about this

time adopted similar means to secure control over rates and thus to insure a cheapening of the transportation service.

The general intention of this early regulation was to fix maximum charges at a point below existing non-competitive rates, but higher than the general level of those in vogue at common centres. The idea of reducing only the highest rates was to give the railroads a chance to recoup themselves by raising their discriminating low charges. The public thought thus to secure the desired reduction of at least the bulk of "extortionate" rates and the abolition of interplace discrimination, without any possibility of injury to vested railroad interests.

When put into actual practice, however, Granger legislation gave results far other than those expected. The reduction of non-competitive charges took place; but, from the nature of the case, rival lines could not raise their rates at common points, for tariffs were there adjusted, not to meet the needs of one or all of the rival carriers, but by the intensity of competition. The fact, therefore, that other railway revenues were reduced, did not cause an increase in competitive rates. Indeed, it served rather to lessen these charges, for the railroads, made desperate by the curtailment of their profits, struggled more fiercely than ever over competitive traffic and quickly reduced charges thereon. Neither local nor personal discriminations were bettered, therefore, and the net effect of Granger law upon the companies was simply to annihilate their profits. Railroads were no longer a paying investment, capital sought other fields, and the development of our railway system was suddenly checked. This result was so evidently due to hostile legislation, and was so serious a blow to the prosperity of our young Western States, that the more severe laws,—such as the "Potter Law" of Wisconsin,—were quickly amended or repealed.

Judged merely on the basis of its immediate purpose, therefore, Granger legislation was a dire failure. True, it had been

more successful than competition in that it had actually brought about a general reduction of so-called extortionate rates; but, as we have seen, this result was accomplished at such cost that all classes were glad to see the laws modified or repealed. Though foiled in its direct object, however, Granger agitation was yet of incalculable value, owing to certain of its indirect results.

In the first place, the Granger contest established, once for all, the quasi-public character of our railroads. Prior to this time, the carriers had claimed to be private corporations, and had asserted that their charters were, therefore, contracts with the State. On this ground, the clause inserted in most railway charters, granting to the companies in so many words the right to fix charges, was claimed by them as inviolable. Furthermore, even in the absence of any charter grant on this subject, our carriers asserted that no governmental body could lawfully interfere in railway rate-making. Control over their respective charges was believed by our railroads to be a property-right due them as ordinary business concerns. When, therefore, legislatures and commissions began to prescribe maximum rates, the railroads at once carried the question to court and vigorously contested the validity of such regulation, asserting that it was an impairment of the obligation of contract, and that it deprived them of property without due process of law. The decisions in these Granger test cases settled the question for all time, the courts everywhere coming to hold that the railroads are common carriers, that they exercise a public function, and that they are, therefore, subject to State control in all respects.

A second important result of Granger legislation was to demonstrate the general superiority of a commission with mandatory power as compared with direct legislative control or with an advisory commission. Of course this whole question was merely one of experience. Direct legislative control was quickly abandoned after trial, for it was found entirely too

inelastic to meet the needs of the case. Moreover, a commission could act more rapidly than the legislature, was more directly responsible, was less open to the danger of corruption —in fact was by far the preferable agent of control, and as such was not long in becoming also the accepted agent. The further question of advisory versus mandatory commission was, perhaps, less definitely settled in Granger days, although the need for the latter form was clearly proven in some cases. New England had been the pioneer section in establishing railway commissions, and had developed the advisory type. That is to say, the New England commissions had investigating, reporting and recommendatory functions, but no power of enforcement. As Charles Francis Adams has aptly expressed it, they served merely "to focus public opinion on the railroads." Now the advisory principle had worked admirably in New England, and a similar type of commission was, therefore, tried in several other parts of the country during the period of Granger regulation. Its lack of success as compared with the compulsory form, quickly brought the people to a realization of the fact that the advisory commission could succeed only in certain environments. The stability of railway conditions and the recognition accorded to public opinion in New England made her experience no criterion for the rest of the country. Nor, indeed, is there reason to suppose that a mandatory commission would have failed, or have been less successful than the advisory type, even in New England. After Granger experience, therefore, we began to see that although there may be circumstances in which a commission will not need to exercise mandatory power, yet it is best to take no risks. In recent years, therefore, we have tended more and more toward the mandatory type, and it is not improbable that if our States continue to have jurisdiction over railway affairs, they will all eventually adopt this form of regulative body.

A third important development from the Granger movement

is found in the dawning realization of public and railway interdependence. The public learned by bitter experience in the early seventies that too severe legislative enactments would check railway development and so react against the prosperity of the community; while the railroads were taught to fear and respect popular opinion. From this crude beginning, the consciousness of harmony in railway and public interests has become steadily, though slowly, a more real factor in controlling railway policy and governmental interference.

In concluding this brief sketch of the Granger movement, we should note that coincident with its cessation came the disappearance of popular agitation for the mere reduction of absolute rates. This change in the public demand was neither because a low rate was no longer desired nor because its attainment had been despaired of, but was the result solely of the fact that a big reduction of railway charges had taken place from natural economic causes. A lessened cost of the transportation service due to technical improvements in tracks, locomotives, etc.; the beginning of competition with waterways for long-distance freight; the development of the railway system so as to bring about a competition of markets; the greatly increased volume of traffic, and many less important influences, combined to cause a rapid decline in transportation charges to a level exceeding the fondest hopes of the early Grangers. Although certain rates might still be thought to yield an excessive profit to the carriers, there was no longer a fear of "extortion" as threatening general prosperity in large sections of the country, and we find, therefore, that on toward the eighties, the cry for reduced rates is heard less and less.

Such, then, is in outline the history of Granger agitation—a movement making the years from 1867 to 1877 of greater aggregate significance in the general evolution of our railway regulation than any other period of equal length. In the light of this fact, a brief consideration of Granger law, its causes and effects, would be pertinent in the treatment of

almost any great railway question. As already intimated, however, there is more direct reason to justify our digression into Granger history, for not only did co-operation of competing lines begin in this period of popular agitation, but such co-operation was so intimately connected with the causes and results of the Granger movement as to seem at times almost a part thereof. For the decade under consideration, the problem of co-operation can be viewed in its true perspective, therefore, only when compared and connected with the more general problem that we have already examined. To this relation between the Granger problem and railway co-operation, let us, therefore, turn our attention.

§ 2–B. To begin with, co-operation of competing lines arose in and from the fierce railway competition that marked the later sixties, and was thus closely allied in origin with the causes of Granger agitation. The rapidity and the speculative character of railway development at that time tended naturally to produce a considerable duplication of lines, and this result was but rendered the more certain by the conscious efforts of the community to foster competition in the hope of reducing rates. The rivalry of parallel roads is fierce in proportion as traffic is scarce and as the companies pursue a short-sighted policy. Both of these conditions were in full force at the time under consideration. Available traffic was rarely more than sufficient to yield a fair return to one line, and with a duplication of roads, the question sifted down to a division of loss. Moreover, the enormous power vested in railway managers and the effort to secure a quick return on invested capital left no hope of conservative and far-sighted methods. When the public succeeded in obtaining a considerable duplication of lines, therefore, scant traffic and reckless policy combined to make competition most bitter. It is not necessary to repeat how this interline rivalry failed to reduce rates sufficiently to satisfy the popular demand, or how it multiplied other abuses; but it is significant to note that while the

public deplored the results of competition and sought their remedy, along with the reduction of rates, in legislative enactment, the carriers were striking at the root of the whole matter in attempting by united action to restrain competition itself. Of course we must admit that their motives were very different, and that neither public nor carrier seems to have been conscious of any connection between railway efforts and the popular endeavor. If, however, we concede,—as I think we must,—that discriminations are directly due to competition, then it would seem that the restraint of competition sought by our carriers tended to accomplish one of the things desired by Granger agitators, namely, abolition of discriminations. Both in origin and in nature, therefore, the early co-operative efforts in restraint of railway competition are akin to the great popular movement of the seventies.

A second line of interrelation between these two is found in an examination of the factors that at that time gave weight to public feeling against co-operation in restraint of competition. It is of course but fair to state at the outset that the major cause of this feeling was then, as now, to be found in a blind and purely traditional reliance upon the equitable workings of competition, any restraint of that force being regarded as *ipso facto*, an injury to industrial welfare. Admitting, however, that this fact accounts for much of the antagonism to "pools," it is still true that special circumstances of Granger days are important factors in this opposition. The general feeling of resentment against the carriers, arising from their short-sighted, autocratic methods, and intensified as time went on and the evils became more and more pronounced, led the public to assume what might be termed a "Granger attitude," toward all railway questions. In other words, the desire to coerce became a habit of mind. Our carriers had so often shown themselves utterly indifferent to public interests that the people had no longer any faith in a *laissez faire* policy, but desired forcibly to harmonize railway methods with the

wishes of the community. Thus arose an indiscriminate demand for regulation, that extended as well to those fields of railway activity in which abuse was only feared, as to those in which abundant evil had already been endured. It seems to me, therefore, that we can attribute the strong movement against pooling and other restraints of competition in the early seventies, partly at least to the general hostility that the public felt toward unregulated railway policy. In part, also, we can explain the especial reluctance to allow any restraint of inter-line rivalry, by the fact that reduction of rates was at that time the chief end of popular endeavor, and an end toward which competition was thought to work without injustice to carrier or to shipper. Naturally, therefore, pooling and consolidation were severely condemned in the seventies, as tending to check competition and therefore to delay or prevent that reduction of rates so urgently demanded. In Granger days, therefore, both the nature of the leading problem and the general hostility felt toward our railroads tended to make any restraint of competition seem especially undesirable, and it is scarcely a matter for surprise that a number of our Western and Southern States, either by constitutional amendment or by statutory enactment, prohibited pooling and consolidation.

The Granger movement and the relation of co-operation thereto mark in a general way the status of public opinion in the decade from 1867 to 1877, and after our discussion of these points, we can, I think, with greater profit turn to the actual course of railway co-operation as a problem.

§ 2–C. Although, as we have seen, the forces that led the carriers to seek a restraint upon competition, and the public to oppose such efforts, are so interwoven with the Granger movement that it is quite justifiable to connect the two in thought, we must not forget that the problem of co-operation does not begin quite so early as the popular effort to reduce rates. The latter was in full swing by 1869, while it was

not until the following year that the former attained its first prominence.

About 1870, then, the co-operation of rival lines became an important railway question and began to attract general attention. Of course, some rate agreements had been in vogue prior to that date, but they had become ineffectual. Now, however, the fierce interline competition that had arisen —from causes already enumerated—led the railroads to engage in most widespread and destructive warfare, making effective agreements seem more necessary to the carriers than at any previous time; and in the endeavor to give interline agreements some degree of stability, the pooling feature was added. Railway pools are said to have originated in New Engand at an earlier date; but although the statement is very probable it has little significance, for if such arrangements were made they were small affairs, dealing with a comparatively mild competition. The first big pool of which we have any record is that of the lines between Chicago and Omaha, formed in 1870, and it is, therefore, no real inaccuracy to date pooling from that year.

The significance of the pool lay in the fact that it gave promise of enabling the railroads to maintain rates. With this hope, our carriers rapidly sought to enforce their agreements by a division of traffic or earnings; and with this fear, the public at once opposed pooling with a bitterness that would be surprising did we not know the traditional reliance upon free competition and the peculiar circumstances of Granger days. It was from these circumstances also, that secrecy was no longer possible in any real restraint of interline rivalry. The concentration of popular attention upon the rate question and the marked difference between competitive and non-competitive charges, made concealment of an effective agreement practically out of the question. The public had but to notice that rates were raised at a common point, in order to be

morally certain that some understanding had been arrived at by the lines there meeting in former competition.

About 1870, therefore,—with competition fierce and our carriers anxious to check its alleged destructive effects; with publicity and, therefore, public condemnation assured should any real restraint be imposed upon interline rivalry; and with the appearance of pooling as a means likely to accomplish such restraint,—the great dispute in railway co-operation began. The railroads, claiming that competition when unrestrained leads to the utter destruction of their profits, and that some check to interline warfare was, therefore, both justifiable and expedient, urged legalization of pooling. The public, believing railway charges to be extortionate and having full confidence in the equitable effects of competition, in no case authorized pooling and in several States prohibited this form of co-operative activity. There is abundant evidence to show, however, that these early statutory and constitutional banns did not really prevent the formation of pooling contracts in the States enacting them. But there was a very real check to the successful working of any restraint upon competition, —though a check that was only in its indirect results a preventive,—namely the attitude of the common law upon the question of competition.

The common law, being but the crystallized aggregate of public opinion, past and present, embodies, along with much other matter, the industrial standards and ideals of the people. The experience of trade from the beginning of modern history up to quite recent times had steadily and consistently impressed the public with the excellence of competition as an equitable regulator of industry, so that we naturally find in Granger days an unbounded faith in that force. It was firmly believed to be the universal panacea for industrial ills, and "competition the life of trade" was almost a creed. The common law, embodying this popular belief, held all efforts to limit the workings of free competition as contrary to public policy.

Needless to say, rate agreements and pooling contracts were placed in this category, and while not strictly illegal, were "extra-legal"—the courts refusing to take cognizance of their existence.

In the absence of all redress at law for violation of agreement in restraint of competition, the carriers found great difficulty in checking rate warfare, even for a short time, whilst any lasting restraint thereof was almost too much to hope for. The only thing the railroads could do was to adopt such a form of contract as would from its inherent character be least susceptible to violation, and experience soon demonstrated the utility of pooling as compared with a mere rate agreement in this respect. Not that the pool was very successful in preventing rate warfare, but at least it was the best form of contract available to accomplish any restraint of competition. A mere agreement as to rates was evidently of no value, for it left the temptations to competition unchanged. Indeed, considering the ease and secrecy with which agreed tariffs could be ignored, a bare promise to maintain charges rather put a premium on dishonesty. Pooling, on the other hand, tends in theory to destroy all motive, either secretly to cut rates or openly to repudiate the whole arrangement. The latter course is rendered undesirable by the fact that the division of traffic or earnings is, theoretically, in such proportion among the co-operating lines as would result from unchecked, but fair and open rivalry. Should a company openly leave the pool, therefore, no advantage is thereby gained in its proportionate share of traffic or earnings, while absolute receipts are certainly lowered by the force of competition. If, on the other hand, a carrier does not wish to leave a pool, any voluntary reduction of rates is folly, as tending to lower the aggregate receipts from which each company must, in the last analysis, draw its fixed proportionate share. In theory, then, there might seem little reason to doubt the possibility of a

comparatively permanent pooling contract even without any legal backing to such an arrangement.

In actual practice, however, although superior to the rate agreement, and therefore adopted almost universally in place of, or in addition to, the latter, the pool was from the start a merely temporary expedient; for the very instability of railway conditions that made it desirable also prevented its long continuance. New roads sprang up, new traffic became available, or in other ways the competitive environment changed, so that co-operating lines were quickly led to believe that in open warfare they might secure a larger proportion of traffic or receipts than they had been receiving under the existing pool. Tariffs were cut, secretly at first and then openly, and a rate war was soon in full progress. With the exhaustion of all engaged therein, a new pool was formed, only to meet in turn a like fate with the old. Such is the course that in general marked the progress of pools in Granger days.

Even in this period, however, we find some pooling arrangements that might claim to be more than a brief respite between battles and that therefore constitute exceptions to the general rule. A good instance of this is furnished by the pool already mentioned as having originated in 1870, between the lines connecting Chicago and Omaha. These were three in number, and so nearly equal in length, financial strength, and all the other factors that go to make up a road's relative advantages, that competition was even more evidently than usual of a suicidal tendency. An agreement was therefore entered into, by the terms of which money receipts were to be equally divided, and this provision to be enforced and competition averted by a system of deposits subject to forfeit. On this simple basis, the Chicago-Omaha Pool met with great success, passing unchanged through the Granger period and lasting many years thereafter—in fact, until several other roads came in and destroyed the original conditions of competition.

Rare as are such early cases of its successful working, the pool has certainly demonstrated thereby the fact that it did contain the possibilities of checking rate warfare, and has, therefore, justified the railroads,—admitting their desire to restrain competition,—in using this form of restraint with increasing frequency until the year 1887, when it was forbidden by the Interstate Commerce Act.

§ 2–D. We have seen now: (1) That the period from 1867 to 1877 was most distinctively the time of Granger agitation, but that closely allied with the causes of this movement came the beginnings of railway co-operation in restraint of competition; (2) that such restraint was by our carriers alleged to be necessary to prevent competition from becoming destructive; (3) that traditional reliance upon competition, unusual hostility to our railroads, and the especial endeavor to reduce rates below their accredited "extortion" point, combined to arouse bitter public opposition to all railway efforts in "restraint of trade;" (4) that the courts, in accordance with the common law, refused to recognize contracts aiming at the elimination or restriction of competition; and (5) that the railroads, though seriously hampered by the extra-legal character of pooling contracts, yet continued to attempt restraint in this form despite public hostility and legislative prohibition, and despite the small success attending their efforts. Such, then, was the general course of our problem in its earliest days.

The Period From 1877 to 1887.

The period of general railway history from 1877 to 1887 is essentially different from the preceding decade. Granger days had been distinctively a time of agitation and upheaval, of new forces and new efforts, of radical changes and rapid evolution in railway problems. Very different was the succeeding decade. The ten years preceding the passage of our Interstate Commerce law were not a time of great innovations, but mark, rather, a gradual adjustment to the results of the

Granger movement. Certain principles of thought and action had been rapidly determined in the fierce warfare between the public and the carriers. A cessation of hostilities now gave opportunity to test the more permanent contributions of the Granger agitation and of its allied questions. In the evolution of railway problems, therefore, the period upon which we now enter is not one of great comparative significance; and yet withal, by 1887, we find that certain important changes have taken place.

§ 3–A. In the first place, a new phase of the rate question had taken the lead in exciting popular interest and condemnation. The fear of extortion had assumed a subordinate place in the eyes of the public, and discrimination in charges was now the great problem. The change had been so gradual, however, that it would be rash indeed to venture any date. The mere diminution of rates effected by the Granger legislation did not at once destroy the interest in regulation of absolute charges. The desired result had indeed been accomplished in so far that there was no longer any pressing need of further reduction, yet the remembrance and fear of excessive charges remained for a long time the leading factor in determining popular feeling toward the railroads. However, with the rapid and continued reduction of rates, resulting not from government regulation but from cheapened cost of transportation service, the public began slowly to see how remote was the future probability of really excessive charges; and, absolute extortion no longer being dreaded, a desire to insure relatively just rates as between different shippers and localities gradually became the chief end of popular agitation.

§ 3–B. The fact that the abolition of discrimination had superseded reduction of rates as the matter of chief moment to the popular mind, is significant in the present discussion, for two reasons:

1. The new question was far less than the old a subject of dispute between the carrier and the public.

2. It was not so closely allied to the specific problem of co-operation—at least not in popular estimate.

1. As to the first point, we find that although discrimination was undoubtedly the leading object of popular hostility by the later eighties, yet this feeling never assumed the bitterness attendant upon the anti-extortion movement of earlier times. To begin with, the public had a newly acquired sense of security. The presence of commissions expressly to guard public welfare by controlling our carriers, and the consciousness that new powers could, if needed, be delegated to these bodies by the State, tended to lessen public suspicion, fear, and watchfulness of railway methods. The improvement in railway policy and the growing recognition of railroad and public interdependence would also, in any case, have taken much of the former bitterness out of popular feeling on all these matters. In addition to such general reasons for a lessened public interest in railway questions, however, the very nature of discrimination made it far less than the leading Granger question a subject for violent and unanimous condemnation by the community at large. Extortion and its cure had constituted a comparatively simple problem—one within the comprehension of all, and one whose solution was of like importance to all. If as the Grangers believed, rates had been too high for general prosperity and at the same time more than sufficient to insure a fair return to the railroads, then it was evidently the welfare of the community forcibly to lower such rates, their continuance being a menace to all. Discrimination, on the other hand, was a less direct, and, therefore, not so evident an attack on the average man's economic well-being, and was for many years opposed chiefly because it conflicted with American ideals of fair play. We see this very clearly from the fact that the "pass" system, though of comparatively little economic importance, aroused an antagonism fully as vigorous and widespread as that felt toward any form of discrimination. Moreover, there were then, as now, many

desirous of continuing the system of "special" rates, in the belief that under such a system they were the favored parties; and frequently, therefore, we find the larger and more influential shippers unwilling to countenance an anti-discrimination law. With the public thus divided on the railway question of the day, and with even the opponents of discrimination failing to realize the full economic significance of that abuse, we find that from the nature of the problem as well as from a lessened public fear of railway methods, there was naturally not so great general interest in the leading question of the eighties as had been evinced toward the topic of Granger days.

The significance of this fact to the problem of co-operation, as indeed to all subordinate problems in the eighties, is that the leading question did not awaken sufficient public interest throughout the period to result in legislative action. True, the Granger laws had quite frequently contained clauses prohibiting discrimination, and further legislation along the same line was thus rendered less necessary; but aside from such additional reasons accounting therefor, the fact of significance is that popular feeling from 1877 to 1887 did not reach such a pitch as to make necessary further statutory enactments against discrimination, although that was the leading question of the day. We do not, therefore, find any further action taken at this time against co-operation of competing lines, as might well have been the case had our law-making bodies been brought to consider any great railway question; for when legislatures are finally set in motion to reform a particular abuse in a given field, they are apt to consider also such minor evils as are thought to exist therein. In the seventies, for example, this species of legislative momentum caused Granger laws to contain, not only such clauses as aimed to reduce rates but many also seeking to remedy abuses that would not in themselves have led to statutory enactment. The change from "extortion" to "discrimination" as the leading railway topic was, therefore, of significance to the problem of co-operation,

in the fact that it resulted in lessening the dispute between public and carrier ; because, from this fact, we can account in large measure for the absence of legislative enactment against restraint of competition throughout the decade.

2. The change was also of significance from the fact that discrimination was not an abuse that could in any way be laid at the door of insufficient competition. Unlike the old question of extortion, therefore, its solution did not seem to call for a prohibition of restraint in active rate warfare, and the problem of co-operation in the eighties is not complicated by its supposed alliance with the leading object of popular antagonism. In other words, whatever feeling there was against discrimination did not include within its field of condemnation the efforts of our carriers to check interline competition, and such efforts are, therefore, less opposed on sympathetic grounds than in the days when "extortion" had been the great object of public hostility.

The fact, then, that owing to the lessened fear of extortion, discrimination had become the leading railway question by 1887, has the double significance we have noticed. It removed that cause of statutory enactment against restraint of railway competition that I have called "legislative momentum," and it tended also to lessen popular hostility consciously directed toward such restraint. In other words, prior to 1887 discrimination was not a question that led to great agitation culminating in legislative enactment against all alleged railway abuse, and it was not a question that aroused public hostility directly toward the co-operation of competing railroads. The whole influence of the change in problems, therefore, was to lessen the opposition to pooling—a tendency that was largely counteracted, however, by an increase in the old unreasoning feeling against restraint of competition.

§ 3–C. During the eighties concentration of capital, chiefly through consolidation in industry, greatly increased the number of large business concerns generally throughout the

United States; and this movement, of undoubted economic advantage in reducing the cost of production, was viewed askance by the public at large. Seeing only the difficulty of organizing new and effective competition with such gigantic rivals already in the field, and dreading the time when consolidation would reduce each branch of industry to a condition of practical monopoly, the people were frightened at the rapidity with which we appeared to approach this end, and came to fear any further restraint upon competition. We find, therefore, a bitter opposition springing up against co-operation among competitors throughout the business world. Perhaps this was in part due to a definite belief that co-operation might pave the way to such harmony as would hasten consolidation, but it would seem more nearly accurate to say that there was really no definite reasoning upon this question. It merely seemed to the public that competition, in which they had such unlimited faith, was threatened with annihilation, and dreading such a result, they were, therefore, led to condemn indiscriminately, and with greater bitterness than before, all forms of restraint upon trade.

Now, this general tendency to oppose co-operation throughout industry, held true of course, as a tendency, in the business of transportation, and may well have counteracted the influence of the change in "problems," from extortion to discrimination. Had there been no other causes of a change in public sentiment, therefore, opposition to pooling might well have remained with its former net intensity. That such was not really the case in 1887, however, we know from authentic data,—such as are furnished in the Cullom Report,—and to account for the very much lessened feeling against pools, we must turn to the actual course of pooling prior to this time.

§ 3–D. From their start about 1870, pooling contracts had spread rapidly. They had grown not merely in number; but, as the railroads began to realize the wider significance of competition in rates, had also developed by including in one

"association" or under one organization, a greater number of lines and a corresponding extent of territory. Such examples as the Southern Railway and Steamship Association, started in 1873, and the Trunk Line Association, organized in 1877 as the product of Albert Fink's genius, will readily call to mind the development at this time of large co-operative organizations devoted chiefly to harmonizing competitive rates. The increased number and size of these traffic associations with the pooling feature doubtless tended at first to augment public opposition to this form of co-operation; but if so, the fact does not seem to have checked their development. Our railroads, continuing to advance their old plea that unchecked competition becomes destructive, kept up their pooling agreements despite public condemnation. This condemnation, moreover, might have continued indefinitely had it not been for the failure of pooling to eliminate even the most violent forms of rate warfare, and for the consequent desperation of the public in their desire to check discriminations.

The non-success of pooling at this time is unquestioned. Among the trunk lines especially there was never a period of such fierce and destructive competition as that from 1876 to 1886. Added to the rivalry of the roads themselves, was a most bitter competition between the Eastern terminal cities. Rates were at nominal figures during the conflicts, and the intervals of peace were of the shortest so that this period, rich alike in pooling contracts and in rate wars, might seem to prove the inability of co-operative endeavor to limit destructive competition.

Such is not the case, however, for to begin with, many possibilities of pooling were obscured or prevented by the fierce rivalry between cities. That element eliminated, the strife would have been much more brief and far less intense. The history of the trunk-line wars shows conclusively that long after all the roads were anxious to enter into a lasting form of co-operative association, a varying number of them

were kept from such a course by the rivalry between our great Atlantic ports. This period has sometimes been quoted as showing the futility of pools without real harmony of effort behind them. The conclusion can scarce be questioned, but it does seem a false interpretation of the history of that particular time, the railroad wars of the decade seeming rather to exemplify the truth, that however great the harmony of effort and the desire for good faith among the carriers, no pooling contract can nullify the effects of competition between markets and between industrial regions.

Even, however, if we concede that all the trunk-line wars were directly due to a wanton breach of faith on the part of the contracting roads, we do not thereby deny all good in the pooling arrangements of the day. Conditions were undoubtedly bad, but would they not have been worse in the absence of any attempt at restraint? Certainly, the fact that most of the roads were earnestly striving the greater part of this period to secure a stable agreement, ought to have lessened in some degree the evils of destructive competition. The persistency with which the railroads sought to secure a firm association at least shows their faith in such co-operative organization. We must remember, too, that the pool was still, as in Granger days, extra legal, and that whatever experience in the eighties may or may not show with regard to this institution, a definite conclusion should not be based thereon with reference to the pool as a legalized form of contract.

However, let the facts accounting for the failure of pools at this time be what they may, certain it is that rate wars were numerous and violent, and that the disastrous nature and results of these conflicts were the chief factors in causing a large part of public opinion to cease its opposition to railway pooling. The injury done to carrier and to shipper from the fierce struggle between competing lines was far more evident than at any previous time. So absurdly low had competitive rates become that even the general public could in part

appreciate the ruinous character of such charges for the railroads; while, on the other hand, owing to the violent fluctuations in tariffs, and even more especially because of the open and secret discrimination practiced, the shipper and the community as a whole did not profit by the "cut rates" offered.

Realizing for the first time that interline rivalry is not a desirable thing in its most extreme instances, the public began to question the merit of prohibiting all restraint upon railway competition. Might our carriers not be right in their persistent claim that pools would not lead to extortion but would merely tend to check "destructive" competition, and so perform what even the public was now beginning to recognize as a necessary service? Certainly, experience of pooling as an extra legal institution had not led to the dire results dreaded and predicted therefrom. It was just possible that the public had all along exaggerated the evils of such restraint upon competition, and that these would really be felt less than the existing abuses resultant from unchecked rate warfare. True, it was generally held to be a choice of evils so far as the alternative lay between pooling and discrimination, but at least there was a choice concerning which the public were led to think and upon which there was difference of opinion. Some would have liked to see pooling legalized; some continued to desire its absolute prohibition; while perhaps the great bulk of the people,—still unwilling to risk the former extreme and no longer sure that the latter was advisable,—were in complete indecision.

§ 3–E. By 1887, then, the one great change in the pooling situation was the modification of public opinion that had taken place during the decade. No important legislative enactments had been passed, nor were the efforts and claims of our railroads and the attitude of our courts in the question of competition versus co-operation, materially different from what they had been ten years earlier. Public opinion, however, had greatly changed. Despite the fact that in the light of an

accredited tendency toward "monopoly," there was, throughout the business world generally, a greater dread than ever of any restraint upon competition, such was not the case in the railway industry. There, the old problem of extortion, the solution of which had from the public standpoint been so pressing a need of Granger days, had now declined in importance, so that there was no longer either the same bitterness of feeling between public and carrier or the same connection between the leading object of popular attack and the efforts of our roads to check interline rivalry. This fact, together with the destructive rate wars prevalent throughout the period and so evidently injurious to the community at large as well as to the railroads,—so evidently creative of instability and discrimination in transportation charges,—was more than sufficient to counteract the growth of indiscriminate dislike to every restraint of competition. The net result of all these influences, therefore, was greatly to lessen popular antagonism toward railway pooling, so that while we do not find very much enthusiasm for such restraint, yet, if we consider the community as a whole in 1887, there seems to have been at least a near approach to neutrality on this question. Pooling, of course, had still many bitter enemies, but it had also new and enthusiastic champions, and if the latter rather overrated the merits of the pool, at least the former exaggerated its dangers. The one extreme view tending to counteract the other, then, and the bulk of the community being in a state of more or less close approach to indifference or indecision, we can at least say that the tendency was toward neutrality, and that since 1877, therefore, the public had greatly modified their views on railway pooling.

§ 3–F. Another great change that took place in popular feeling during this period, was the growth of a desire for national regulation of our carriers. So far, we have not considered this change, because it had no real bearing upon the question of co-operation prior to 1887; but, inasmuch as its

tangible result,—the Interstate Commerce Act,—has been at least the basis of all subsequent railway regulation, some attention should be given to this law before we take up the period since its passage.

In the first place, the demand for national regulation followed inevitably upon the growing inefficiency of our States to control the "quasi-public" industry of transportation. Experience had long since demonstrated the desirability of some governmental regulation, and the growth of our railway system was bringing out more clearly day by day the fact that our States should not be left as sole agents in this task. By the rapid development of our transportation system through the building of new lines, and by the still more rapid process of consolidation, our companies had come to cover an enormous extent of territory and had at the same time grown to a corresponding degree in wealth and power. Under such circumstances, the lack of uniformity in State railway laws was naturally becoming more and more objectionable, while the great prestige and the financial strength of the corporations was making them each year a more dominant and corrupting influence in State politics. It is not surprising, therefore, to find throughout this period a growing demand for national regulation. We see, for example, that as early as January 20, 1874, Mr. McCreary, Representative from Iowa, and chairman of the House Committee on Railways and Canals, introduced into the House a bill looking to the Federal regulation of interstate railways. This measure was aimed primarily at the prevention of extortionate charges in both the freight and the passenger service; and in the especial emphasis laid upon this feature, as also in its general tenor, was not dissimilar to the early State "Granger" laws. Although this bill passed the House in March, after full discussion, it was never considered by the Senate. Four years later, on May 2, 1878, Representative Reagan, of Texas, began a vigorous attempt to secure Federal railway regulation. The measure he then introduced,

—as a substitute for three other bills proposed,—was supported by Mr. Mills, of Texas, Mr. Townshend, of Illinois, Mr. Thompson, of Pennsylvania, and others, and finally passed the House on December 11, 1878. Like its predecessor, however, this bill was never passed in the Senate, and failed, therefore, to become a law. A more nearly successful attempt at national regulation was made some five years later. On March 1, 1884, a "bill to establish a board of commissioners of interstate commerce and to regulate such commerce," was reported to the House, and finally passed that body on January 8, 1885. Meanwhile, on April 28, 1884, a measure for Federal railway regulation was introduced into the Senate by Senator Cullom from the Committee on Railroads, and the debates following developed pretty definite ideas on the question. When, therefore, the House bill came before the Senate,—as it did January 17, 1885,—that body, while accepting the measure, did so only after radical amendment. Returned to the House, the bill as amended, was killed on February 27, 1885. Within a month, however, the first steps were taken that ultimately led to the passage of the Interstate Commerce Act. It was no later than March 21, 1885, that a special commission was appointed in conformity with a resolution of the Senate (March 17) to investigate existing railway conditions. The report of this famous "Cullom" committee was ready for publication on January 18, 1886, and upon its able picture of the railway situation and upon its recommendations for national regulation, was based the Interstate Commerce Act.

That this law should have passed in 1887 may indeed be chiefly due to the slowly developed recognition of national control as inherently superior to regulation by our States, but it is also true that the Supreme Court decision in the case of the Wabash, St. Louis & Pacific Railway Company *vs.* the State of Illinois (118 U. S. Rep. 557), made national regulation almost necessary. Prior to this decision the States had

exercised control, such as it was, over all our railroads, for each State claimed jurisdiction over all traffic by rail while that traffic was within the State's own borders. The Supreme Court now stepped in, however, and said that Congress, having power to regulate interstate commerce, only the traffic that is confined wholly to one State is subject to that State's control. Of course this decision at once freed a large part of our railway system from all governmental restraint, and led immediately to a vigorous demand for national regulation as a remedy for this state of affairs. Whatever would have resulted in the absence of the Supreme Court decision, therefore, we can at least say that the influence thereof was certainly very great in bringing about the passage (in February, 1887), of the Interstate Commerce Law.

§ 3–G. The first section of this act is introductory in character and states the scope of the measure. Roughly, it is to apply to "common carriers," transporting passengers or property wholly or in part by rail, under arrangement for a continuous carriage from the United States to any foreign country, or from any State or Territory or from the District of Columbia to any other State or Territory or to the District of Columbia. This clause also states that charges must be reasonable. Sections two and three prohibit personal and local discriminations. Section four, the famous "Long and Short Haul Clause," specially prohibits that form of local discrimination involved in a greater charge for a shorter than for a longer haul, over the same line, in the same direction, and under "substantially similar circumstances and conditions." The commission is given discretionary power to suspend this rule for special cases, however. The fifth section prohibits pooling of freight or earnings. Section six provides at some length for publicity of rates. Section seven declares illegal any combination or agreement, expressed or implied, to prevent continuous carriage. The remaining seventeen sections provide in considerable detail for the enforcement of the above provisions, but it is

sufficient for our purpose to note that a commission of five men, appointed by the President, was made the chief agency of our national regulation. True, the courts were also assigned a considerable part in the scheme of control, but Congress seems to have intended that they should play the lesser rôle; that they should merely act as a court of appeal to prevent the commission from overstepping its lawful authority, or that they should use their judicial powers at call of the commission to enforce the lawful orders of that body. If this interpretation be correct, the commission created by the Interstate Commerce Act was more mandatory than advisory in character, though not wholly of either type.

From what has already been said of public opinion at this time, it must be evident how much the law of 1887 is an embodiment thereof. That a scheme of national railway legislation should then have been adopted is of itself, in the light of previous failures in this respect, partly at least a proof of the new and broadened concept of railway and public needs. Again, that the commission should have been intended to conform so nearly to the mandatory type, is evidence of the growing favor of regulation in the latter form rather than by means of an advisory commission, or directly by legislative enactment.

More important, however, are the reflections of popular opinion that are to be found in the directly regulative clauses of the act. In the last analysis these come under three heads: (1) Ordering reasonableness in rates; (2) forbidding discriminations in every form; and (3) prohibiting pools. Publicity in rates might perhaps be made a fourth division, but after all, this provision seems scarcely so much a distinct feature as a means for the enforcement of the other three leading purposes. The relative stress laid upon the second, as compared with the first of these leading purposes, brings out very clearly the trend of public thought upon railway matters. The demand for reasonable rates is embodied in one

short sentence, and this fact, together with the insignificant position afforded that sentence,—almost as an after thought in the introductory section,—shows how thoroughly time had dispelled the great fear of really burdensome rates. In distinct contrast is the prominence afforded the clauses prohibiting discrimination. Worded closely after the English law of 1854, they constitute three entire sections of the act, whilst, indeed, the remainder of the statute is largely auxiliary to an evident leading purpose of preventing discrimination. With nothing but the text of the act before us, then, it would not be difficult to infer how pressing a question was discrimination, and how relatively insignificant the problem of extortion by 1887.

Of the anti-pooling section, on the other hand, the history, rather than the content, was indicative of popular opinion. Pools had not been forbidden in the bill as originally drafted by the Cullom committee, for that body, while recognizing no great benefit in pooling, was none the less opposed to its prohibition. In their report, for example, they said that "the evils to be attributed to pooling are not those which most need correction, and, if agreements between carriers should prove necessary to the success of a system of established and published rates, it would seem wiser to permit such agreements rather than by prohibiting them to render the enforcement and maintenance of agreed rates impracticable." In other words, the committee seem to have realized the utter inconsistency of a legislative enactment attempting to abolish discrimination and at the same time forbidding the pool—the one means that had hitherto availed our carriers in their efforts to prevent destructive rate warfare. Whether the committee did or did not fully recognize the necessary sequence of competition and discrimination, however, they at all events presented a measure containing no reference to pooling. In such form, moreover, the bill was accepted by the Senate, but upon reaching the House was amended so as to include the present fifth section,

with which it finally passed. Thus, the history of the anti-pooling clause is but typical of popular doubt, uncertainty and difference of opinion on the whole question of railway competition.

With the passage of the Interstate Commerce Act, there was a very evident change in railway conditions throughout the United States. Co-operation was especially affected because, by denying the right of pooling, the law really knocked the prop from under former efforts in restraint of railway competition, and thus, completely altered the status of the phase of co-operation most distinctively a problem. In utilizing the year 1887, therefore, to inaugurate the third and last period of our study, there is at least nearer approach to accuracy than in the earlier arbitrary points of division in a subject that is after all a real unit.

The Period From 1887 to the Present.

§ 4–A. It may be well to explain at the outset that from 1887 on, the activity of our States as regulators of railway affairs has become of relatively less and less importance. The natural extension of our lines in response to new demands for transportation facilities; their consolidation, fostered by the inability to enforce rate agreements; and the new concept that the termini of the journey rather than the termini of the railroad fix the interstate character of traffic—all tended to make national regulation increasingly important as compared with State control. True, State legislation has by no means ceased to be important, but the necessary limits of time and space in the present essay force us to confine our attention in studying this decade from 1887 to 1897 to the national law, its enforcement, its changes and the effects which it has had upon railway co-operation.

The years since 1887 have been an active time in the history of railway problems, but the events have been different in nature from those of any earlier period. In Granger days the

carriers, having abused their freedom from restraint, thereby aroused public antagonism and evoked strict legislative enactments. Then followed a decade in which the results of Granger agitation were tested in the light of experience, public opinion gradually coming to the conclusion that discrimination ought to be more effectually prevented. With this end in view, as well as to continue such regulation as experience had shown to be expedient and the decision of 1886 had so largely taken out of State hands, the Interstate Commerce Law was enacted. Since the passage of this act, however, our activity in railway regulation has passed out of legislative into judicial hands, or, rather, has become a species of "judicial legislation." In the problem of co-operation especially, the great changes that have taken place since 1887 have arisen from court decisions, while public opinion, legislation, and even the activity of the commission have played a comparatively unimportant part.

It is not strange that a loss of general popular interest in railway questions and a consequent lack of legislation thereon should be found after the passage of the Interstate Commerce Act, for in that law the public accomplished in a lump the results for which they had been striving, and there followed a natural cessation of effort. Even had the law been a failure, therefore, it would probably have taken some time for the community again to become sufficiently aroused to demand further legislation; but the very beginnings of such a movement were prevented by the smooth and satisfactory workings of the act in its first few years of active operation. The improvement in the railway situation, owing to the wise orders of the commission and the ready obedience of our carriers, quickly led the public to assume that the machinery of railway regulation would in future run on smoothly without their further attention. Having all faith in the commission, therefore, the community quickly relaxed its direct watchfulness of the situation.

This extreme confidence in the commission has by no means been misplaced, for that careful and conservative body of able men, devoting its sole attention to railway matters, has acted as eyes for the public, and has done what it could to carry out the Interstate Commerce Act as an effective measure of regulation. That its later efforts have not been very successful is no discredit to the commission, therefore, but must, I think, be attributed almost wholly to the fact that judicial decisions have stripped it of so many of its powers that it has, as the commission declares, "ceased to be a body for the regulation of interstate carriers," and has become powerless to protect the public.

Without going further afield to discuss the general regulative situation, however, let us turn to the actual course of railway efforts in restraint of competition during the present decade.

§ 4–B. With the passage of the Interstate Commerce Act, pooling, as we have seen, became illegal, and railway rate agreements, although theoretically unchanged, were made far less effective in practice. Of this there can be little doubt, for while the service of the pool in enforcing interline contracts has probably received considerable exaggeration at the hands of its champions, yet the most conservative will scarce deny that an agreement in restraint of competition is rendered more binding if accompanied by a pooling arrangement. Indeed, it is hard to see how we could doubt this fact when we remember that for nearly twenty years our carriers, in their desire to check rate warfare, had almost invariably sought the pool as the one form of agreement that offered any reasonable chance of stability. Unquestionably, therefore, the law declaring such contracts illegal had considerable influence in weakening all efforts in restraint of competition. Technically, however, the rate agreement remained as before, legal though not enforceable at law, and the only immediate direct effect of the Interstate Commerce Act upon the various co-operative associations of railroads was to cause their reorganization without

the pooling feature. Efforts in restraint of competition were not discontinued because their most effective form was no longer lawful. Just as the extra-legal pool had been better than no pool at all, so now the rate agreement, even without any pooling feature, was preferable to absolutely unlimited competition in charges. The railroads might not be able so well as before to check rate warfare, but at least they would do all in their power toward accomplishing that result.

Indeed, the case was not really so bad as might at first sight appear; for, after all, the great increase in the stability of our railway conditions more than counterbalanced the fact that the more effective form of agreement was no longer available, and we find several instances throughout the decade where rate wars have for a considerable time been prevented. One of the most notable, perhaps, is that of the Southern Railway and Steamship Association, including, as it did, most of the lines east of the Mississippi and south of the Ohio and Potomac. Denied the right of pooling in 1887, that organization yet managed, by a system of fines, to maintain rates for six years, and went to pieces only in the extremely unstable conditions arising from the crisis of 1893. Since January, 1896, when its articles of agreement went into effect, the Joint Traffic Association has furnished us with another example of a rate agreement maintained despite the absence of a pooling feature. Indeed, it is very probable that as our railway conditions became more stable, and as the companies realized more clearly the need of a non-fluctuating rate sheet, the rate agreement, even without the pooling feature, would have come to be a fairly effective form of interline co-operation. Whether the problem of railway competition would thus eventually have been solved, it is hard to say; but at all events, the chances of this result were suddenly destroyed by a court decision declaring the rate agreement illegal under the Sherman Anti-Trust Law of 1890.

§ 4–C. The so-called "Sherman Anti-Trust Law" of July 2, 1890, is entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." Its chief influence upon railway questions has arisen under its first section, which reads: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal."

On March 15, 1889,—more than a year before the passage of the above act,—the Trans-Missouri Freight Association had been formed. In the articles of agreement, the purpose of the organization had been set forth as "mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." A committee, made up of one representative from each road in the association,—the representatives having full power over the rates of their respective roads,—was to meet monthly and vote upon all proposed changes in rates. If any road should make a rate differing from the agreed charge, such a violation of agreement should subject the offending carrier to fine. Any underbilling or false classification was to be regarded as a violation of agreement.

The above agreement went into effect April 1, 1889, and on July 6, 1892, the United States as complainant filed a bill against the Trans-Missouri Freight Association in the Circuit Court for the district of Kansas, to have the agreement set aside and declared illegal, and to have the association dissolved. The United States lost the case here, as also later in the Circuit Court of Appeals, but upon carrying the matter to the Supreme Court, secured, on March 22, 1897, a decision of five to four against the association.

Judge Peckham, voicing the decision of the court, answered two questions of interest to us: (1) Does the Anti-Trust Law apply to the transportation industry? (2) Granting that it

does so apply, was the Trans-Missouri Freight Association in violation of that law?

On the first point, the court decided that common carriers engaged in interstate commerce are subject to the act of 1890. Judge Peckham's arguments, briefly paraphrased, are as follows:

(*a*) The text of the law by itself would certainly seem to apply to the business of transportation, for railroad companies are instruments of commerce and their business is itself commerce. When, therefore, the act prohibits contracts in "restraint of trade or commerce," its jurisdiction certainly extends to contracts between competing roads and relating to traffic rates for the transportation of articles of commerce, provided said contracts constitute a "restraint." The latter question is merely one of fact, however, and upon its answer depends the validity of the particular contract in dispute; but the right of the courts to take cognizance of such contracts, lies not in this question, but in the principle that said contract *could* constitute a restraint of trade or commerce.

(*b*) There is no evidence that the intent of Congress was other than the above interpretation. The court does not think that the Interstate Commerce Act, either directly or by fair implication, authorized agreements as to competitive rates, so that there is no validity in the argument that the law of 1890 does not in plain language repeal any part of the act of 1887 and is, therefore, not intended to apply to the transportation business. Neither being inconsistent with each other, both statutes stand in their entirety. The fact that the act of 1887 is not repealed or modified in any way, therefore, is owing to the fact that the two laws could not in any event have conflicted, and is no evidence that Congress did not intend the Anti-Trust Law to apply to railroads. Nor do the records of Congress prove anything conclusive on this point. In the judgment of the court, they merely show that opinion differed on this question of jurisdiction. The fact that an attempt to

amend the bill of 1890 so as to make it apply specifically to the business of transportation, was defeated, may merely indicate a consensus of opinion that the measure *as it stood* was all sufficient for that purpose. Moreover, in the language of the court, "There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations among different roads." The general history of the times, therefore, does not admit the conclusion that Congress had in mind only industrial trusts referring to the manufacture and sale of commodities. Nor, again, would the exception of the railway business from the jurisdiction of the act have been likely from a realization by Congress that transportation differs from other industry. Even if competition between railroads were different from its nature in other business, the public character of the railway industry would more than counteract all other points of difference, and Congress would, therefore, be inclined to legislate upon transportation rather than upon other forms of industry. Besides, the statement that a railway rate-agreement will not tend to increase actual charges, has nothing to do with the question. The whole point lies in the fact that by a combination of capital, the contracting roads *have the power* to raise rates. In this essential, there is really no difference between the railways and other industries, and we have no reason, therefore, to suppose that Congress would make an exception of the railway business.

(*c*) The language of the statute is not sufficiently uncertain to allow the court,—by a species of judicial legislation,—to except the railway business. Indeed, in this case the difficulty lies rather in applying the law to the manufacture and sale of commodities than to their transportation.

On these grounds, then, the court held that the statute of 1890 applies, and was intended to apply, to common carriers

by rail, and on this decision proceeded to condemn the Trans-Missouri Freight Association, as follows:

In the common law, "contracts in restraint of trade and commerce" are illegal only when such contracts are an "unreasonable" restraint. Claiming, then, that the agreement in question is not an "unreasonable" restraint,—aiming as it does to secure merely reasonable rates,—and that the Anti-Trust Law intended to prohibit only those agreements held illegal in the common law, the defendants assert that the articles of the Trans-Missouri Freight Association are not a violation of the statute. This assertion is an error. The court denies in toto that the Anti-Trust Law intended to prohibit only those agreements held "unreasonable" at common law. The language of the title—"An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies"—does not show that the purpose of the act was to include only contracts which were "unlawful" at common law, but refers to and includes also restraints and monopolies made unlawful in the act. Referring to the body of the act then for elucidation of the phrase "unlawful restraints," we find the clear statement, that "*every* contract, combination, etc., in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal." It is evident, therefore, that the prohibition is not limited to merely "unreasonable" restraints, and the mere fact that certain "contracts in restraint of trade" are valid at common law, has nothing to do with a statute expressly prohibiting *all* such contracts. Furthermore, the fact that *one* road may charge what is reasonable, is no ground for allowing an *agreement* to maintain what rates competitive roads may adjudge reasonable. In charges made by each road separately, competition is an element and insures the public against extortion, but when rates are fixed by agreement, competition is eliminated and the public has no guarantee of a merely reasonable charge. In conclusion, then, the court said that the intent of those in the

agreement to receive no more than a fair remuneration, does not really enter into the case. Without questioning the reasonableness of the restraint, therefore, the court is compelled to declare the agreement invalid on the mere fact that it does impose a restraint.

Such, then, is the famous Peckham decision, which, having determined the present unlawful status of rate agreements, is certainly of the greatest importance, but whether or not it is also a valid interpretation of the case in hand, does not so readily appear. At least, many eminent authorities still think that the Anti-Trust Law does not really prohibit such agreements as that of the Trans-Missouri Freight Association; and, as perhaps the best expression of this view, the dissenting opinion, voiced in the above case by Judge White and supported by three other justices, is of considerable interest.

Judge White takes as premises two concessions of the court, (1) that only "unreasonable" restraints violate the common law; and (2) that the agreement in question is not "unreasonable." From these, he endeavors to prove that the articles of the Trans-Missouri Freight Association are not unlawful under the act of 1890, because that statute did not mean to abolish restraints held to be "reasonable" at common law.

(*a*) To begin with, if the Anti-Trust Law does make illegal such an agreement as that in question, the act is a departure from the general principles of law, for by destroying the "right of individuals and corporations to enter into very many reasonable contracts . . . . the act of Congress is itself unreasonable." On the ground of reason, therefore, it seems highly improbable that Congress meant to abolish "reasonable" restraints upon competition.

(*b*) Nor is such a conclusion justified by the wording of the act. Judge Peckham's view,—that "contracts in restraint of trade" are either "reasonable" or "unreasonable," but that when you say "*every* contract," etc., you include both kinds,—is erroneous. The meaning is really not dependent upon the

word "every," but upon the true meaning of the phrase "in restraint of trade." However accurate a use of the English language it may be to call a "restraint of trade" "reasonable," restraint has come to have a generic meaning in the common law, and in that meaning is confined to "unreasonable restraints." When, therefore, the statute prohibits "every restraint of trade or commerce," it really means to abolish "restraints" in their technical significance, namely, "unreasonable" restraints.

(*c*) The latter part of the argument gives reasons additional to (*a*) above, why Congress could not have intended to abolish reasonable restraints. The use of the word "unlawful" in the title of the act seems to indicate a clear recognition of the fact that certain restraints are not unlawful. Again, the plain intent of the statute is to protect liberty of contract and freedom of trade. It could not, therefore, reasonably deny liberty of contract by declaring illegal such agreements as do not infringe freedom of trade—that is, "reasonable" agreements.

With these and a few minor arguments, Judge White concludes that the Anti-Trust Law applies, and was intended to apply, only to "unreasonable" restraints of trade, and that a reasonable agreement such as that of the Trans-Missouri Freight Association is not invalid under the act of 1890. As we have seen, however, it was the contrary opinion that had back of it the majority of the court, and the ultimate result of the case was to make illegal all agreements as to competitive rates, and to cause traffic associations either to dissolve or to reorganize, omitting the now unlawful feature of contract.

One exception to the general rule is found in the case of the Joint Traffic Association. The agreement of this organization had been attacked in the Circuit Court for the Southern District of New York, on January 8, 1896, and had there been held legal. The case was then carried to the Circuit Court of Appeals and another favorable decision rendered. The matter having progressed this far when the Peckham decision

was announced, our Eastern trunk lines did not recall their agreement, but continued to operate thereunder as before—awaiting the decision of the Supreme Court to which the "Joint Traffic" case was appealed. There was even then little doubt in any mind but what that decision would force the carriers to forego their restraint of competition; and this expectation has received subsequent fulfillment by the court of last resort.

The Supreme Court, in 1897, by its interpretation of the Anti-Trust Law, has prohibited even those restraints upon trade and commerce that are admitted to be reasonable. Unsatisfactory as such a decision would in any case have seemed to those desirous of railway prosperity, the judgment of the court is the more objectionable because not based upon a general consensus of judicial opinion. The Supreme Court decision was not only obtained on the narrowest possible margin, but was also in practical opposition to the views of four lower tribunals. Of course we must recognize the fact that the judgment was made in good faith, not on a bias of opinion as to what should be; but at least it is unfortunate that our railroads should be deprived of all protection against "destructive" competition without greater certainty that Congress intended such a result.

§ 4–D. Aside from the actual change that took place during the present decade in the lawful field of railway co-operation, it is of interest to note the attitude of court and commission,—the two bodies most directly concerned in the course of railway regulation since 1887,—toward the question of interline competition. The disputed point of how far competition is an element for consideration in the fourth section of the Interstate Commerce Act is perhaps the best from which to infer the great prominence our courts have accorded to competition. The no less conservative, but far more rational, view of our commission is also strikingly illustrated in this question. To its investigation, therefore, let us turn.

§ 4–D[1]. By 1887, one form of discrimination had become especially prevalent, or at least it appeared especially evident and obnoxious to the public. Competition had early forced rival lines to reduce rates to and from certain "common" points. Tariffs remaining unchanged for intermediate stations, it was not long before the greater charge was made for the shorter haul. In other words, there had arisen, *from the fact of competition*, a practice of charging more for a shorter than for a longer haul over the same line in the same direction. This phase of discrimination, Congress unquestionably intended to abolish in the fourth section of the Interstate Commerce Act, although the possibility of injustice in an iron-clad law led to the insertion of a provision giving the commission power to suspend the rule for particular cases where the discrimination seemed justifiable. The dispute over this section is not as to its general intent or discretionary exception, however, but arises wholly from the fact that the prohibition is restricted not only to hauls "over the same line in the same direction," but also to hauls made under "substantially similar circumstances and conditions." It is the meaning of this phrase that has been the fruitful source of difference of opinion.

To quote the commission: "There was apparently little question at the outset as to the meaning of this section. The words 'similar circumstances and conditions' evidently took the place of the words 'same circumstances' in the English act, and the meaning of that phrase had already been defined by the English decisions"—as having reference—"entirely to the carriage of the merchandise itself and not to other conditions leading up to or surrounding such carriage." Furthermore, "it was generally understood that the words 'substantially similar circumstances and conditions' would receive an interpretation upon the same lines." This has in actual practice not been the case, neither the commission nor the courts having confined their decisions within the scope of the above principle.

Examining first the view of the commission, we find that body almost from the start recognizing as an element of "dissimilarity," the competition of transportation agents *not subject to the act.* Evidently such an interpretation is just, for in the absence of this exception to the general prohibition, an interstate railroad, obliged to reduce intermediate charges along with competitive rates, would be placed at a great and unwarranted disadvantage in competing with a rival not subject to the act and, therefore, not under such obligation. There seems no element of injustice, then, in the decision of the commission that competition not subject to the act, creates the necessary dissimilarity of circumstances and conditions under the fourth section, while competition subject to the act does not. This view not only satisfies the claims of equity, but has been found a "reasonable and practicable interpretation" of the law. As the commission has stated: "Under this interpretation of the section, if the rate was controlled by unregulated competition, the carrier might meet it without an application to the commission. If competition between carriers subject to the act afforded a sufficient excuse, as it might, the commission could grant leave, upon application and after full hearing, to make the lower rate to the more distant point. This apparently effectuated the intention of the act. It gave the carrier all the liberty to which it was entitled in the first instance, and it provided that it might obtain from the commission whatever relief the circumstances warranted." Except in a part of the Southern territory, our railroads throughout the country accepted the above interpretation of the section and made their rates in conformity thereto.

As a matter rather of interest than of importance, it may be well to note the fact that the above quotation from the commission is open to criticism when applied to the early practice of that body. It might be inferred from the passage referred to, that the commission was, from the first, in the habit of permitting exemptions from the fourth section *only* on

and after a full hearing and approval of the reasons alleged for such a privilege. In truth, however, while this was unquestionably the theory of the act, the commission found that in practice the number of petitions for relief under section four was far greater than they had either time or machinery to adjudicate. The commission was therefore led to adopt the more expedient plan of allowing the roads to discriminate without first obtaining permission so to do; the commission reserving the right to pass upon such a de facto breach of the law, if and when complaint was made to it because of the said discrimination. In other words, the commission followed the policy that when a road chose to consider itself as having a meritorious reason for exemption, the said road might act on this belief without a prior application to the commission; but such discriminations as might thereby arise, would be at the peril of the road permitting them, and subject to correction and redress by the commission if, upon complaint to that body, it was there decided that the circumstances were not, as the road had assumed, "dissimilar" in the sense of justifying discrimination. After all, however, this is wholly a question of practice, and perhaps of no moment in our discussion even as relating to past conditions. Certainly it is a question without value to-day, for the commission has long since so improved its administrative facilities as to be able to hear,—and therefore to insist upon hearing,—all pleas for exemption *before* permitting any deviation from the anti-discrimination features of the act.

The judicial interpretation of "dissimilarity in circumstances" has differed both in fact and in effect from the opinion of the commission. The list of cases in which the question has been mooted in our courts is indeed formidable, but the trend of judicial opinion has ever been the same with reference to this fourth section. In order to set forth the view toward which our courts have progressed, therefore, the attitude of the Supreme Court November, 1897, in the case

of the "Interstate Commerce Commission versus the Alabama Midland Railway Company *et al.*" is all-sufficient. In this "Troy Case," as it is popularly called, the court held that competition, even when between carriers subject to the Interstate Commerce Act, creates a dissimilarity of circumstances sufficient to justify a greater charge for the shorter distance. Such a decision practically nullifies the "Long and Short Haul" clause. As already stated, the intent of Congress was to abolish a particular form of discrimination arising from interline competition. When, therefore, the Supreme Court holds that the presence of competition is in itself a valid reason to regard the prohibitory part of the fourth section as of no effect, the worth of the whole clause is thereby destroyed. As the commission has expressed it: "Competition is the only reason why a carrier would desire to charge less to the more distant point, and if competition justifies him in so doing, there is nothing left for the section to act upon." In this particular instance of judicial legislation, then, our courts have decided that exemption from the fourth section is really to be granted *as a premium on competition.*

The railroads readily appreciated the full significance of this decision, as we see from its effect upon their methods of rate-making. For instance, charges to Denver and other common points in Colorado, over lines from Chicago, the Mississippi, and the Missouri, had, prior to the decision of November, 1897, practically all conformed to the provisions of the fourth section. Within less than a week after the Troy Case was settled, however, through rates were on the whole less than half as high as charges from intermediate points. This one example is but typical, and is, therefore, significant of the general readiness with which rates revert to their old discriminations in the absence of any restraint upon competition. "Unless the country,"—in the words of the commission,—"is satisfied to undergo a recurrence to the practices which existed

before the passage of this section (the fourth) it must, in some form or other, be re-enacted."

§ 4–D². Evidently the commission is not so prone as our courts to overestimate the value of competition, but seems clearly to recognize the fact that evil results can and do arise from interline rivalry, and that such abuses are to be abolished despite the fact that competition must thereby be rendered less fierce. Indeed, our commission has recently gone a step further and has in certain instances undertaken directly to regulate the "relativity of rates"—that is to say, the ratio of charges upon one line to those in vogue on another road. In the absence of any control over minimum rates, however, such regulation had hitherto been of a purely advisory character, as, for example, in the "Eau Claire Lumber Case" (5 I. C. C. 264).

Certain parties here alleged that rates on lumber from Eau Claire to common markets were high as compared with charges in vogue from Winona and La Crosse. The commission, convinced that the complaint was just, ordered that in future the Eau Claire roads should not charge more than a prescribed differential, somewhat lower than the one prevalent. The roads from Eau Claire at once obeyed the order by reducing their charges until at the required ratio to tariffs over the Winona and La Crosse lines. The latter, however, immediately lowered their rates also so as to restore the old relativity, and gave notice that any subsequent reductions at Eau Claire would be followed by a corresponding cut in their own charges. The commission, having no authority to forbid a reduction in rates, was of course unable to prevent the execution of this threat, and was, therefore, forced to let charges remain at whatever ratio the carriers or competition might decide.

Deploring its helplessness in this respect, our commission is to-day urging that it be given power effectually to regulate the relativity of rates, and such a demand is of the greatest

significance when we remember that to exercise the desired power, must be, in so far, *to annihilate direct competition in rates.* Indeed, this statement is a truism, for competition in rates *means* an effort to change the relativity of charges, and such an effort forbidden, it is needless to say that there can be no rate warfare. In reality, then, our commission has not only come to recognize a fact to which, as we have seen, the courts appear still to be blind,—the fact, namely, that certain practices arising from competition are extremely undesirable and should be abolished,—but has actually called for a grant of powers to eliminate competition in certain cases where the relativity of rates, as determined thereby, is not to the welfare of the community.

§ 4–D^3. In the attitude that the commission has adopted toward pooling, however, we see the climax of its progressive conservatism. In reporting the present situation, it is said that while violations of published tariffs are of course misdemeanors under the Interstate Commerce Act, yet there is abundant evidence of "facts which are morally convincing, although not of a character to secure a legal conviction," to show that "at the present time very large quantities of competitive traffic are carried at other than published rates." In other words, the commission, whose judgment on such a point we have no reason to question, asserts in plain terms its own inadequacy to prevent this secret cutting and discrimination. That such departures from published rates are an evil, is admitted by carrier and public alike, and there is thus a pressing desire to remedy present conditions. Now, the railroads almost unanimously claim that the one proper, because effective remedy, lies in legalization of pooling, and certainly, as the commission says about this opinion of the carriers, "they are in better position to judge than anyone else, and they constitute so important a part of the whole public that they are entitled to careful attention in a matter which they insist is vital to them." Besides, a majority of the commission is itself

of the opinion that pooling would at least tend to cure the ills of discrimination, the only fear being that the attendant destruction of competition,—at present the "only protection against unreasonable exactions,"—would give the carriers absolute power over rates and so lead to extortion. To prevent this, the recommendation is made that before legalizing the pool, certain restraints should be imposed upon the "enormous power which such a measure would place in the hands of railroad companies." We thus see that, while still clinging in part to the old dread of extortion, the commission has, nevertheless, come to believe that government regulation can be made sufficiently effective to prevent abnormal charges, and that this result assured, pooling would no longer be open to serious objection, but would be advisable because desired by the railroads and because tending to lessen the abuse of discrimination.

§ 4–E. If now we briefly summarize the situation, since 1887, we find in the general field of railway regulation :

1. That the public, in reliance upon their agent, the commission, have ceased to take such direct active interest in railway problems as was prevalent during Granger days or even in the following decade ;

2. That in this absence of strong public feeling, legislative activity has not been called into play to pass any important measure upon exclusively railway matters ;

3. That the commission has ably striven to execute its trust, but has seen "judicial legislation" strip it of power after power until, on its own statement, it is to-day not in a position to protect the public ; and,

4. That the courts have been the dominating factor, for by their interpretation of the Anti-Trust Law *all* railway co-operation in restraint of competition has become unlawful, and by their interpretation of the Interstate Commerce Act, the commission has become bankrupt in all real powers of regulation.

In the theoretic problem of co-operation as it stands to-day under the above regulative situation, there are three great sources of active opinion—the railroads themselves, the courts and the commission; and, summarizing in brief what must be evident from the material already given, we find:

1. That the railroads maintain, with unabated zeal, their old position in favor of legalized pooling;

2. That the courts are strongly the champions of free competition; and,

3. That the commission is in favor of legalizing the pool, provided proper precautions be first taken to prevent "extortion."

The attitude of the railroads is not surprising. Convinced by experience of the destructive effects of competition, what more natural than that they should desire its restraint by legalization of the means in past found most effective to that end? Nor should we wonder at finding the courts in favor of "free competition." As interpreters of law and custom, they are apt to be extremely conservative, giving great weight to traditions of the past, and in the question of competition this means, of course, an attitude of opposition to all restraint thereof.

The really significant present opinion is that of the commission. This body has no bias of personal gain, and no reason to accept what has been or what is, as of necessity right. A group of able and intellectual men, devoting their whole attention to railway questions, they have at length decided after ten years of experience under the Interstate Commerce Act,—a ten years in which they have been rather non-committal on the question,—that legalization of pooling is on the whole to be desired. Whatever tangible results this expression of opinion may eventually have, certainly emanating from so impartial and capable a source, it *should* be given great weight. Upon the question of pooling, we may say of

the commission, as it has said of the railroads, "certainly they are in a position to know."

On the whole, then, we find to-day that the courts, on the one hand, and the railroads, supported by the commission, on the other, differ almost as radically in their views upon the question of co-operation to restrain competition, as did ever public and carrier in Granger days. Of course, there is no longer the same deep and widespread interest in the matter, nor is there the old bitterness of feeling between the disputants, but the problem itself remains and is now as heretofore a fruitful source for argument.

III. Railway Co-operation to Unify Freight Classification.

§ 1. Since making brief mention of co-operation between connecting lines at the outset of the present essay, our attention has been confined to the rate agreements and pooling contracts of competing carriers. We have looked at the motives first leading the railroads to favor, and the public to oppose, restraint of interline competition; we have noted decade by decade the different sources and the varying intensity of the feeling for and against the pool and rate-agreement; and we have observed the actual status of these co-operative efforts in each period. In other words, we have traced the evolution of the one great problem in the field of railway co-operation. It would be a mistake, however, to suppose from our almost exclusive attention thereto, that the adjustment of competitive charges and the pooling of traffic or of money receipts were the only immediate subjects of joint railway endeavor. Publicity of tariff schedules; regulations for the examination of books and accounts, and for the weighing and inspection of goods shipped; rules as to the discharge of employees found guilty of giving special rates, and concerning the degree of responsibility resting upon each

road for such action on the part of its agents—these and countless other allied details were arranged by interline co-operation. It must be evident that such ends were merely contributory to the effectiveness of a pool or rate agreement, and would not, in and of themselves, have had any significance—perhaps not even any existence. Not so, one other phase of railway co-operation, for while unquestionably contributing alike to the promotion of through traffic and to the effectiveness of contracts in restraint of competition, the development of railway freight classification has also proven of independent merit. Moreover, while never really a "problem,"—the answer being almost self-evident,—it has certainly, during the last ten years, been a question of considerable import. Before leaving the evolutional phase of our subject, therefore, it may be well briefly to note the development of freight classification in the United States.

§ 2. In our early railway history, it was quickly realized that a separate rate for each commodity carried would not only render impossible any scientific principles of tariff-making, but would result in the formation of a rate-sheet so unwieldy as to be of no practical utility. It was seen, moreover, that many articles are not materially different in value, bulk, method of shipment or the other points of distinction that would necessitate a dissimilarity in transportation charges. It was found both practicable and expedient, therefore, to group together certain kinds of freight as subject to a common charge. By this means rate-making was greatly facilitated and the published schedule became at least a less difficult puzzle than before. Freight classifications were quickly adopted, therefore, on all our railroads.

Prior to the first beginnings of railway co-operation, each road was perfectly independent of all others, and naturally adopted a classification wholly its own, so that until the middle of the century there were practically as many different freight classifications as there were roads in the country. When,

however, it became necessary to establish rates by joint agreement,—at first, with reference to through shipments, but later, for competitive traffic also,—simplicity and economy made necessary a common basis for these agreed tariffs. With the spread of co-operative rate-making among our railroads, therefore, freight classifications were rapidly unified, until by 1886 their number had been reduced to about fifty.

Up to this time, the movement to unification had been practically on the sole initiative of the railroads interested. Indeed, for many years after classification was well under way, the public had paid little or no attention either to classification or to the actual rate-sheets in vogue. Every shipper had made his own terms with the carrier, and naturally, therefore, freight classifications had been commonly regarded as mere guides for soliciting agents, and not as documents of any importance to the community at large. The question of classification was looked upon as one of interest to the railroads alone, a mere technical matter, a detail of administration that the carriers might settle as they pleased, the results in nowise concerning the shipper.

By the middle eighties, however, the public had abandoned their old attitude of indifference. This was a time of strong popular antagonism to all forms of discrimination. The establishment of a clear and simple rate-sheet to which carrier and shipper should alike conform, was felt to be extremely desirable in the field of railway reform. Moreover, the public had come to see that neither clearness nor simplicity was possible in the rate for a given long-distance shipment that happened to pass over roads with differing bases of classification. As an inseparable part of the movement against discrimination, therefore, there was a strong feeling that freight classification ought to be unified throughout the United States. As the commission says of the fifty-odd classifications in force in 1886: "Even these comparatively few had given rise to

serious and almost universal complaints, and the Senate ('Cullom') Committee reported that shippers were unanimously in favor of a single classification for the whole country."

Our carriers, fully recognizing that enforcement of the Interstate Commerce Act would require a greater unification than was then existent, and fearing that in the absence of action on their own volition there was serious danger of legislative interference in the matter, had already begun taking steps to reduce the number of different classifications. In view of this voluntary activity, the committee did not recommend any definite enactment on the subject, and consequently, the Interstate Commerce Act makes no reference to freight classifications other than to order their publication under direction of the commission.

Nor did any legislative spur seem necessary. The carriers appeared to be both willing and able to adopt a uniform classification and advanced so rapidly toward their goal that even before the passage of the act there were left but three great classifications in the whole country: (1) The "Official," covering on the whole the Trunk Line region—the territory north of the Ohio and Potomac Rivers and from the Atlantic Coast to a line connecting Chicago, St. Louis and Cairo; (2) the "Western," in vogue throughout the territory west of the Mississippi; and (3) the "Southern," used by lines south of the Ohio and Potomac and east of the Mississippi. It is true there were still a few others in 1887, but they were of such little comparative importance that it is no practical error to name the above great classifications as at this time covering the entire United States.

The public and the commission continuing to urge further unification, a serious effort was made within the year to satisfy this demand by consolidating the Official and the Western classifications. The attempt was unsuccessful, but not through any fault of the carriers concerned. Indeed, there seemed every

promise that the union would take place, when a sudden outbreak of violent rate warfare led to the breaking off of negotiations.

In 1888 another attempt at consolidation was made, and this time the endeavor was to unite the entire country under a single freight classification. Congress had not yet gotten over the "momentum" of interference in railway matters, and in recognition of the undoubted need of a single basis for rate-making, the House of Representatives passed a resolution calling upon the commission to establish a uniform classification before January 1, 1889. The Senate, however, upon representation of the commission that the time set was too short to allow of their considering in full a subject so complicated as freight classification, and that the railroads seemed willing to undertake the matter on their own volition, took no action. It was a close call though, and the carriers, realizing that there was very imminent danger of a single classification prescribed by law, at once took steps to establish one of their own framing. Representatives of the various associations held a convention in Chicago, and after several months of careful deliberation at length worked out a scheme of uniformity.

Unfortunately this never went into effect, for it was at once rejected by the Eastern trunk lines. The failure to adopt the plan recommended by the convention does not indicate, however, that the idea of a single classification was at this time really unpalatable to the carriers, for the objections of the trunk lines were directed, not against the principle of unification or even against the actual classification suggested, but wholly against the proposed machinery for its revision. It appears that this consisted of a board of twenty-two members, only six of whom were to represent the interests of the roads in the "official" territory. Expenses, on the other hand, were to be levied on a basis of tonnage. Now, the Eastern trunk lines claimed to carry three-fourths of all interstate traffic at this time, and would, therefore, have had to pay the

greater part of total expenses while represented by less than one-third of the board of management. Objecting to any such arrangement, the "official" lines withdrew, and thus the first and only serious effort on the part of our carriers to secure a uniform classification fell through at the last minute.

Since 1889 there has not even been an attempt at voluntary unification, nor has Congress taken any steps to further the adoption of a single classification. The latter fact is to be explained, I think, by the decline of direct popular interest in railroad problems and by the resultant fact that Congress has gotten out of the way of legislating upon railway matters. Certainly the need of uniform classification has not lessened. It is, of course, probably true that discriminations have become much less numerous within the past ten years, owing to the growing stability of our railway conditions, to the good offices of our commission, to the prevalence of a better spirit among our carriers, and to other causes of a like nature. Whether this be so or not, however, there is unquestionably much room for further improvement. Discriminations are still abundant and continue to be a great source of dissatisfaction to shipper and to carrier. Nor is it any more apparent to-day than in 1889 that we can ever secure complete freedom from this abuse without first establishing a single basis for rate-making. Unification is, what it must ever be until accomplished, a pressing need of the day. As the commission says: "That the present diversity results in many discriminations and losses can not be doubted, and there is no single step that may be taken by the carriers which will go so far to secure the establishment of stable rates as the adoption of a single and comparatively fixed classification. It would take out of the hands of importunate shippers and irresponsible railroad agents the power of interfering with rates, as they now too frequently do."

On the whole then, freight classification has been an important feature of co-operative endeavor. The move toward

uniformity on the basis of rate-making,—begun to meet a purely administrative need in framing through freight charges, fostered later by the extension of co-operative rate-making to cover competitive traffic, and, after discrimination became the popular bugbear, vigorously supported, or rather urged, by public opinion,—had by 1887 far outgrown the other fields of co-operation. In that year, with many different rate-agreements, pools and associations throughout the United States, the entire country was covered by but three freight classifications. Unfortunately, the number has not subsequently been reduced although there has been, and is, unanimity of opinion in favor of further consolidation. A single classification is bound to come, however, the only question being how and when the much needed reform will be accomplished.

This query brings us again to the "future" of our subject, and having now completed our sketch of past evolution in the three great fields of railway co-operation that have developed in the United States, let us briefly examine into present wants and their satisfaction. In other words, let us ask ourselves for each of the leading phases of co-operation, the two questions: (1) What ought to be? (2) How can we best accomplish it?

PART II.

The Present Needs of Railway Co-operation.

I. Through Routing and Through Rating.

§ 1. At the outset of the present essay, we discussed a form of railway coactivity which was the first to develop in the United States—namely, that of connecting lines to facilitate through traffic. We saw that throughout the history of such co-operation, there has been practical unanimity of opinion as to what is desirable. Shipper and carrier have agreed that every effort to promote the smooth workings of through traffic is a decided benefit alike to the public and to the railroads. The end to be sought, therefore, is such complete co-operation of the companies concerned as will result in providing all reasonable facilities for through routing and through rating over connecting lines. Neither cost nor delay nor inconvenience of any sort should be materially greater in shipping a consignment of freight over a composite route than in sending the same traffic a like distance on a single road.

§ 2. We are at present far from realizing this ideal, owing to the fact that our carriers in many cases refuse to co-operate with connecting lines. This statement may seem at first sight to contradict the assertion that our railroads desire to promote such joint activity. The contradiction is only apparent, however. The co-operation of connecting lines had always been, in and of itself, desirable, and as we have seen it is only when competition is a disturbing factor and seems to offer an even more alluring alternative, that there is any hesitation to interchange traffic on the most favorable terms. While there are exceptions to this general rule,—as notably in the South, where through routes are by common practice established only for

certain points, and intermediate stations in receiving shipments are burdened by having to pay the through rate up to the nearest of these basic points plus the local charge from there on,—it remains true, upon the whole, that the situation with reference to connecting lines would be satisfactory were they never competitors.

§ 3. Whatever its course, however, the lack of all-sufficient through routing and through rating is unquestioned, and it seems in every way expedient to make co-operation to that end compulsory. The slight reduction in profits that might thereby result for carriers not at present deeming a through rate to their advantage, would in most cases be a mere loss of monopoly earnings (note the case of the N. Y., N. H. & H. R.R., page 111), and would at any rate be many-fold outweighed by the gain to other roads and to the public at large. The change would undoubtedly be for the welfare of the community as a whole, and there is really no legitimate, vested interest to stand in the way of carrying out this needed reform.

Nor would it in practice be a difficult task. The Interstate Commerce Act requires that carriers "afford all reasonable, proper and equal facilities for the interchange of traffic between their several lines, and for receiving, forwarding and delivering of passengers and property to and from their several lines and those connected therewith." Moreover, our commission has already decided that the word "facilities" here refers to through rates as well as to through routes. It is only necessary, therefore, to take the clause as it stands and to follow the example of England with respect to a similar provision of the Act of 1854, by providing machinery for its enforcement. An amendment to the present law, giving the commission power, upon complaint of a carrier or shipper, to enforce the above quoted clause under suitable penalty, when satisfied by investigation that its purposes are being violated —such an amendment would practically eliminate unjust

refusals of connecting lines to co-operate and would, thereby, meet all present needs in this phase of railway coactivity.

II. Uniform Classification of Freight.

§ 1. In the question of freight classification, the end to be sought is no less obvious than in the matter of through routing and through rating. There is, as we have seen, practical unanimity of opinion in favor of a single basis for rate-making. No one to-day questions the desirability of a uniform classification for the whole country, and it only remains to utilize the most expedient means to that end.

§ 2. In view of the fact that since 1887 our railroads have made no serious efforts to consolidate existing classifications, the commission began in 1891 to abandon their former advocacy of a *laissez faire* attitude on the part of Congress and have since that date steadily favored a reverse policy. In their 1897 report, it is urged upon Congress that the railroads be required within a given time ("not longer than one year") to adopt a uniform classification for the whole United States; that a failure to comply be sufficient warrant for the commission to prescribe a classification of its own under suitable penalty to insure its adoption; and that, in either case, the commission have full power at any time to amend said classification in such degree as may upon investigation appear "reasonable and necessary."

The plan thus suggested is so evidently a satisfactory solution of the difficulty that it is scarce necessary to say anything in its defence. Obviously it is desirable that we secure the needed consolidation as soon as possible. Again, we must not forget that our carriers have far more than Congress, the commission, or any other available body, the knowledge and experience prerequisite in framing a satisfactory classification. It is evidently advisable, therefore, that the adjustment and consolidation of existing classifications be undertaken in the

first instance by the railroads in co-operation, and that resort be had to another source for the desired reform only in case of the evident unwillingness or inability of our companies themselves to accomplish the task within a reasonable time limit. Furthermore, a scheme adopted in even the most favorable way would probably contain many errors of detail, and to insure remedy of such as might in practice come to work injustice, it is certainly well that the commission should have amendatory power. Now all these features,—the certainty of a single classification in the near future, every opportunity for railroad initiative, and effective control by the commission,—are insured by the passage of legislation as proposed by that body. Obviously, therefore, the plan suggested is a desirable remedy for the present lack of a uniform classification.

III. Co-operation in Restraint of Rate Competition.

§ 1. If now we turn to the third great field of railway co-operation, that involving restraint of competition, we encounter at the outset a difficulty not present in the other two, for we find, instead of unanimity, the greatest diversity of opinion as to what is really desirable. There is nothing in the attitude of the community or any part thereof upon which we may base an *a priori* conclusion in this matter. The railroads, the commission, the courts, and the public at large,—so far as these groups may be said each to have a distinctive view,—express the most varied degrees of favor or opposition toward restraint of interline competition. True, the railroads and the commission, the two groups best qualified to pass judgment on the question, are agreed in saying that absolutely unchecked rivalry is not desirable. Our carriers at least might put forth such a claim, however, and yet know in their hearts (if "soulless corporations" have such organs) that the welfare of the

community demanded "free" railway competition. Self-interest being a strong factor in the case, their expressions of opinion carry no necessary conviction. On the other hand, there is no presumption that the courts and the people are right. They seem on the whole to agree in opposing a restraint of competition, but then, judicial decision is based so largely on precedent, and popular opinion on unreasoning acceptance of traditions,—both are so apt to move in grooves,—that we cannot accept either as of certainty correct. It is evident, then, that in taking up the question of co-operation to restrain competition, we must, at the outset, cast aside all prejudice, precedent and self-interest, and endeavor to decide the problem impartially upon its own merits.

The task is not an easy one, and it might even at first sight appear that the conclusion must after all be predominantly a matter of personal opinion. This is not so true as it would seem to be, however. A mere presentation of the facts in the case will, I think, be sufficient to lead inevitably to one conclusion. The differences of opinion that to-day exist on the advisability of checking railway competition, are, after all, differences that arise from greater or less ignorance on the question at issue. If every one were wholly free from personal bias and in full possession of all the facts bearing upon the matter, we should find about the same harmony of opinion as in the other great questions of railway co-operation. What that opinion would be will appear as we proceed.

The first question to be answered concerns the merits of railway competition. We must, at the outset, discover whether or not interline rivalry is on the whole productive of satisfactory results. Do the carriers, the shippers, the public at large, any one or more of these classes, find their best interests under free railway competition?

§ 2. Concerning the railroads themselves, there can be little doubt as to the answer. Rate warfare is, for them, beyond question destructive. In every industry, of course, profits

are greatest when, other things being equal, active rivalry is least intense. Competition among producers has always a tendency to diminish net gains by increasing cost and by lowering the market price. The latter, however, cannot in most industries remain permanently below the cost of production for the producer least favorably situated. If the return does not at any given time reimburse this "marginal" man, he will cease to produce, and, the supply being thus lessened, prices will tend to rise. If, on the other hand, they be much above the cost of production under the least favorable conditions, the chance of profit will tempt new competitors into the field until the supply is so increased that, to be disposed of in its entirety, the commodity must be sold for a lower return. Prices under free competition tend, therefore, ever to an equitable adjustment. They will be not too low to at least reimburse all producers, and not so high as to admit of being called extortionate.

While this theory is pretty generally applicable to other industries, the fact remains that for our carriers it does not hold true. An investment in a railroad is doubly permanent in that railway capital can neither be withdrawn from the realm of industry nor utilized for other than transportation purposes. When, therefore, competition reduces charges to a point unprofitable for the least favored company, that company cannot retire or utilize its enormous "plant" save to carry passengers and freight. Indeed, owing to the nature of railway expenses, a road must continue to perform its function at losing rates, for to cease operations would involve even greater loss. Fixed charges and the cost of keeping tracks and rolling-stock in repair, together constitute by far the greater part of railway expenses. Mere cost of operation is a comparatively unimportant item. This latter, however, is the only expense that ceases when a road lies idle. Fixed charges and repairs go on, for a road "rusts out as quickly as it wears out," and interest on bonded indebtedness must be met under

any circumstances. It can never "pay" a company, therefore, to cease operations while there is a chance of clearing more than running expenses. The surplus, however small, is just so much toward meeting fixed charges and repairs, obligations that would otherwise be a total loss.

It is obvious, then, that an interline rate-war means a very different thing from competition in most industries. Of course, rivalry tends in the one case, as in the other, toward such a reduction of prices that the marginal producer finds it just barely to his interests to continue operations. While in the average business, however, that point corresponds to the point of equality between total receipts and total expenditures, and the least favored producer, while a man of "no profits" is also a man of "no losses," the case is very different for our railroads. Competition among our carriers will continue to lower charges long after they have in the aggregate ceased to meet total expenses, for, as we have seen, the peculiar conditions of railway investment make traffic at "losing" rates preferable to no traffic at all. While, therefore, it is perhaps tautological to speak of "destructive competition,"—for all competition is to some extent destructive,—the railroads find this effect so much less a mere potentiality and so much more a grave reality than do other industries, that the phrase is not without its value. Applied to interline rivalry, it serves a useful purpose by emphasizing the most marked feature thereof, for unquestionably railway competition is in the very fullest sense of the word "destructive."

This is not simply a theory. It is, on the contrary, a fact very much in evidence under present railway conditions. As it was said in 1896 by an eminent authority on railway matters,—the Honorable Martin A. Knapp,—"Making all allowance for dishonest construction, excessive capitalization and wasteful methods of operation, it is yet startling to learn that 60 per cent of our railways never paid a dividend on stock and that more than one-fourth of our mileage has recently

been in the hands of a receiver through inability to meet interest on mortgages." Certainly, we must agree that such a condition of affairs is "not reconcilable with a just and defensible theory of railway operations."

§ 3. Not only is unrestrained competition an evil for the carriers, however, but, from the very fact of annihilating railway profits, is also a blow at public welfare. Aside even from being a direct loss to the not inconsiderable portion of our populace financially interested in railway projects, a rate war, by rendering transportation companies less desirable as a future form of investment, inflicts a very real injury upon the community at large. Our railroads proving unprofitable, capital is led to seek other channels, and railway growth and development are checked. New lines will not be built except for speculative purposes, and those already in operation will be run at a lower standard of safety and general excellence. How quickly and how seriously such a result would react against public welfare needs no proof in our present-day knowledge of dependence upon an efficient transportation service.

The convenience of the public is further sacrificed by that lack of railway harmony often a contributing cause, generally a result, and always an accompanying feature of active interline rivalry. As the Honorable Thomas M. Cooley expressed it: "Railroad companies cannot be accommodating to the full extent of the public needs unless they are accommodating to each other; for a very large proportion of those who have occasion to use their facilities, desire to pass in person or with their property, from one road to another, and wish to do this without unnecessary cost of transfer or unnecessary delay." In other words, to repeat a fact already noted, it is almost wholly due to more or less direct rivalry between the carriers concerned, that through routing and through rating over connecting lines, are at present in an unsatisfactory condition. Indeed, not only this phase of joint effort, but every other

form of railway co-operation is less fully developed than would be the case were competition restrained or wholly eliminated. Warfare, save in the lessons it teaches, is not conducive to peace; and strife does not promote good feeling. How then can we look for the most satisfactory co-working of independent railroads in any field so long as active rate contests continue? We may, of course, make compulsory a uniform classification, through routing and through rating and other desirable features of railway co-operation; but after they are established, competition still remains an element of discord to prevent their attaining the best possible results.

Far more serious than a lack of harmony between our railroads,—desirable as it is that the unity of our transportation system receive conscious recognition in practice as in theory,—are the evils of discrimination and instability in rates, and of these, railway competition is the prime cause. Violent fluctuations in charges are indeed less the result than the very essence of interline warfare. Active competition expresses itself in a changing rate-sheet. "Cuts" are the weapons of the conflict, while even the briefest cessation of hostilities is normally marked by a rise in tariffs. An unstable schedule of charges is, therefore, inseparable from railway competition, and is unquestionably a serious evil. So sharp is competition among producers to-day that their profits depend on a very narrow margin, and net gain or net loss is often determined by a slight change in transportation charges. What we normally call "legitimate" industry is really made a pure speculation. Circumstances over which a manufacturer has no control may double his profits or annihilate them. On a calculation of his productive capacity for a month or more, he orders a great bulk of raw materials from a distance and pays a given rate to have them transported to his establishment. The next week, by a sudden cut in railway tariffs, a rival concern is enabled to lay in an exactly similar stock at lower cost. The difference will probably be such that a loss is certain for

the first producer, no amount of industry or ability being able to counterbalance his competitor's chance advantage in cost of material. Certainly there is just as much real "discrimination" in this instability of rates as could be found in contemporaneous differences to different shippers, the intention only being wanting to make the cases parallel. There can be no question either but what rate warfare, with its attendant fluctuations in charges, greatly emphasizes the speculative features of industry in general and is, therefore, a serious evil for the whole community.

Discriminations, properly so called, special rates to certain shippers and to particular localities, lead to abuses long recognized and almost universally condemned. The American ideal is that every man shall have equal industrial opportunities, but evidently, so long as the great overland highway of the modern world does not levy its tolls with the strictest impartiality, the desired equality is impossible. The adjustment of rate-sheets on a basis of special contract with each shipper, is no less destructive of fair competition among producers and among consumers than would be a like method in the apportioning of government taxes on the materials and products of industry. The result in either case is to foster industrial trusts and monopolies, and the abuse of discrimination is scarcely greater than would be a lack of uniformity in taxation. Indeed, Mr. Knapp is led to say that "no alliance of capital, no aggregate of productive forces, would prove of real or at least of permanent disadvantage if rigidly subjected to just and impartial charges for public transportation."

This great evil of discrimination has been an inevitable consequence of railway competition. A reduction in rates is not the result of philanthropic motives, but is made because a carrier hopes thereby either immediately or ultimately to protect or increase its aggregate receipts, and these depend much more upon the amount of freight hauled than upon the unit charge for its transportation. A struggle for traffic tends,

therefore, very greatly to lessen the charges thereon, and as the intensity of the struggle varies, so will the extent of the reduction. Thus it is that at common centres there always prevail relatively lower rates than at non-competitive points, and that big shippers, whose traffic means a great deal and whose patronage is eagerly striven for, can obtain favors not accorded to small dealers. Discriminations against the small shipper and against the locality with but one available railroad are natural results of unchecked rivalry among our carriers.

Furthermore, despite the most stringent legislative prohibition, these abuses cannot be eliminated while competition remains unchecked. Experience under the Interstate Commerce Act has clearly demonstrated the fact that while the law can compel the publication of tariffs free from any suggestion of discrimination, this evil will yet continue; for rates will in secret depart from the printed schedule and vary, as before, in favor of the common centre and the large shipper. The fact is not surprising either, when we remember that the original motives to discrimination are in nowise lessened and that a legal prohibition is really not enforceable. As the commission says, while they "have no doubt that at the present time very large quantities of competitive traffic are carried at other than published rates," the facts are "not of a character to secure a legal conviction." Evidently the railroads have but to exercise ordinary care to grant their favors only where self-interest will insure the silence of the recipient,—that is, to show favor only to large shippers,—and there is no practical means to make good a prohibitory law. Congress might pass statute after statute on the question, but none would be effective until attack was made on the very root of the evil—until interline rivalry was checked. If this were done sufficiently to free our carriers from the necessity of yielding to the demands of large shippers, then we might hope that secret as well as open discriminations would be abolished.

On the whole, we have seen that there are many evils arising from unrestrained railway competition. It is destructive, not only of railway profits, but of interline harmony and of stable and uniform rates as well. The companies themselves, the shippers, and the entire community are in greater or less degree sufferers from rate warfare. The finances of the railroads are thereby depleted; shippers are subjected to the injustice and loss associated with a régime of fluctuating charges and secret departure from published rates; while throughout the community, prices are unsettled by the introduction of a speculative element, an element of chance, into even the most legitimate industries.

§ 4. With such results from direct railway competition in rate-making, its continuance without restraint is justified only if there are greater evils to be feared from a cessation of active rivalry than from its continuance; and whether this be so or not, is largely dependent upon the proposed form of restraint.

Government management, a remedy urged by some, seems utterly impracticable. Such a scheme is not adapted to the spirit of our institutions, and would in practice yield no satisfactory results. In our present lack of an able administrative system, Federal control would not only involve a great increase in the cost of management, but would make it doubtful whether, at any cost, present standards of efficiency in railway service could be maintained. Besides, as Mr. Aldace F. Walker says: "No greater injury could befall our republican institutions than the establishment of a branch of the public service which would throw open to the field of politics the railway service of the land."

Eliminating, therefore, all question of government control, as at best a doubtful improvement over the evils of rate warfare, we find that private management offers two possible restraints of railway competition, namely, co-operation and consolidation. Against both of these, there is raised the

objection that to check interline rivalry under private management is to insure exorbitant "monopoly" charges. Were it not for this fear however, co-operation would probably be acceptable to the great mass of its present opponents. With consolidation, the case is different. In opposition to this remedy, there are many charges aside from that of causing extortion. The concentration of capital involved, the increased power, political and social, that would be placed in the hands of a small and decreasing number of men; the fact that our railroads are themselves averse to the scheme, each being unwilling to yield its separate existence by absorption into another organization—these and many additional objections are, with some truth, urged against the consolidation of our railroads to cure competitive ills. The remedy might be worse than the disease.

It is not our province, however, to discuss the relative merits of consolidation and unchecked rate warfare, but it is important to note the fact that if a restraint upon competition is desirable, it is most desirable in the form of railway co-operation, and within that field a pooling contract is of course preferable. Our problem really narrows down, therefore, to the question of whether or not pooling will result in extortion and thereby lead to an abuse generally considered more serious than the aggregate of competitive evils. If exorbitant charges are a certain outcome of the pool, then no restraint of competition is wholly satisfactory; but if the reverse assumption be true, then, having established pooling as harmless, the relative merits of less desirable restraints are immaterial. It only remains, therefore, to discover the probable danger in an agreed division of traffic or earnings. Is it true that such an arrangement will break down the one existing barrier against extortion, and so expose the community to a flood of excessive rates?

§ 5. An affirmative answer is often made to this query, on the assumption that a railway pooling contract will wholly

eliminate competition as a restraint upon the carriers concerned. Even were such the case, the dire results supposed to follow upon this state of affairs are greatly exaggerated. Even if our railroads had autocratic power over rates, it is at least questionable if they would find the point of maximum profits in a really exorbitant charge. Railway welfare would more probably lie on the line of building up industry by fixing aggregate rates at the lowest point compatible with a fair return on invested capital.

Whatever be true of a complete annihilation of railway competition, however, the pooling contract could not thereby be proven undesirable; for the fact remains that a pool does not destroy all active rivalry. When two or more carriers agree as to the proportion of competitive traffic or the percentage of total earnings that shall be assigned to each, they do so on the basis of the division that would be made by and under the workings of free competition. Now, it is evident that our unstable railway conditions would lead the carriers to make rather frequent adjustments of the agreed apportionment, so as to keep it in close conformity to the relativity that would exist in the presence of unrestrained rivalry. In view of these periodic readjustments, each company will, of course, strive to show that the existing arrangement is not equitable, and that, on the basis of its facilities and management, it ought to have a larger share of the total business. The fact that a road has entered into a pool with its rivals, therefore, does not destroy the motives to attract an increased tonnage. Competition in rates may be eliminated, but competition will continue in service. As Judge Cooley says: "Rivalry for public favor will go on as before, though it may be expected that some of the features of rivalry, which, when it is hostile, are peculiarly injurious to the public, will be eliminated by the agreement to work in harmony."

It may be urged with considerable truth, however, that the public is to-day in greater need of lower rates than of a more

efficient railway service, and that the fact of continued rivalry in the latter feature is not a sufficient compensation for the loss of competition in the former. The argument is a good one, but it has a great fault—it does not apply to the point at issue. There is really no question of "compensation," for the simple reason that pooling will not remove the element of competition even from the field of rate-making. The phase of rivalry that we are apt to associate most clearly with rate warfare, the rivalry of parallel lines, will indeed be checked, but there will remain a species of competition no less potent in its effects. A reasonable maximum of tariffs is not dependent solely upon direct competition, and the undue prominence in past attached thereto, has been the result of its "marginal" effects. Being the last factor tending to reduce rates, direct competition has attracted chief attention, so much so indeed, that in its absence the public is led to fear a "monopoly" with its attendant extortion.

In reality, however, exorbitant charges would be prevented by forms of competition that are not directly a phase of interline rivalry, and that are, for that very reason, utterly beyond railway control. With the cessation of rate wars between parallel lines, tariffs would indeed rise, but not, as alleged, without other limit than that set by railway "greed." The influence of direct competition once removed, the other checks to extortion would become "marginal" in their effects. The possible increase in rates would depend, therefore, wholly upon the difference between the old and the new margin, and, as a matter of opinion, I venture to assert that the chance of "extortion" would be far less than the danger of continued "destruction." In other words, the new limit would more likely be too low than too high. It would tend rather to leave undue checks upon railway prosperity than to overburden the shipper with unreasonable tolls.

In the absence of direct competition in rates, charges will be controlled by the competition of markets and of industrial

regions. Take for instance, the familiar example to be found in the rivalry of New York and New Orleans as points of export for Western wheat. Every new facility for handling grain at New Orleans, not followed by a corresponding improvement at New York, is just so much inducement for wheat to leave the country by the former rather than by the latter gateway. If, therefore, the railroads from the Northwest to New York would not see their former traffic diverted, they must reduce their rates; and if, on the other hand, the roads to New Orleans would secure the natural advantages of their shorter haul, they must adopt a similar plan. Thus the competition of two "markets,"—of an Atlantic and a Gulf port,—will result in a species of railway competition that, if less destructive than a direct rate war, will at least be equally effective in preventing extortion. Aside from the case quoted, there are many other examples of this indirect competitive influence that might be taken from present conditions. Dr. E. R. Johnson states that "Pennsylvania and Virginia coal competes in New England with that from Nova Scotia; the various coal fields west of the Alleghenies compete with each other; the Southern iron and the Northern iron are competitors. California and Florida and the Mediterranean countries are all producing for markets in Northern States. Producers of American export commodities are competing with foreign producers in the markets of the world." On the basis of such facts, Dr. Johnson concludes that "the cost of goods in the consumers' market being in part determined by transportation charges, the railroads serving competing industrial regions are unable to fix their rates at will. Industrial competition determines what they may charge."

Even aside from the active competition of different regions, however, there is a potential competition in the relative opportunities in one locality as compared with another, and this too is effective in preventing extortion. Suppose, for instance, two industrial regions, one in the Eastern part of the United

States and the other in the extreme West, each producing a given commodity for an adjacent area of five hundred miles radius. It would seem, at first glance, as if there could be no possible rivalry between these two centres of production, and yet there is a very real competition in the relativity of opportunity, no mean part of which is to-day a question of transportation charges to respective markets. Other things being equal, if the Eastern region be favored with lower rates than those prevailing in the Western, fresh capital and mobile industries will leave the former and seek the latter centre. As all trade and manufactures of old followed the coast or river banks for the free highway there afforded, so to-day the producer locates chiefly on the line of cheapest railway communication. The amount of traffic available for a given road is, therefore, in the long run dependent largely upon the rates of that road in relation to those prevailing upon every other line in the country. There is thus a very real form of competition that traffic associations could not eliminate and that will prevent at least the continuance of extortion.

Upon the whole, then, we may say that no pooling agreement could give the carriers absolute control over rates. Competition of markets and of industrial regions, as also the varying relativity of charges throughout the country, creating a difference of industrial opportunity, will together tend to keep rates below an unreasonable maximum. The public is not justified, therefore, in fearing any serious evil from a lessened intensity of direct interline rivalry, and since its continuance unrestrained does involve objectionable results, there seems every reason, on the merits of the case, to encourage railway pooling as being the most satisfactory restraint.

§ 6. Indeed, to legalize the pool would be expedient even if it were not recognized as inherently desirable, for a restraint of railway competition is certain to come, and if denied the path of interline agreement it will seek the way of consolidation. As has been well said, "unless railway managers can

associate, railway owners must combine." Nor could legislative prohibition of consolidation be made effective. If railway history has shown anything, it has clearly demonstrated the futility of such statutes. Like usury laws they can be so readily evaded that in the absence of strong motives for voluntary obedience in spirit as well as in letter, there is no real significance in these legislative enactments. In practice, therefore, consolidation is a resort always open to competing lines, and if forbidden the more desirable check upon rate warfare,—if denied the right of co-operating,—they will be certain, in the long run, to avoid the destructive effects of direct competition by uniting under one management. In view of this fact, and admitting that a pool is preferable to railway consolidation, the legalization of pooling should meet with favor even among those who deny its inherent merits.

Of course we must not go to the extreme of imagining that the pool will accomplish everything claimed for it by its most ardent admirers. Legal recognition of pooling contracts will not inaugurate a millennium in the railway world. On the other hand, it is equally certain that co-operation in restraint of competition will not lead to serious abuses. In their unreasoning fear of extortion, the opponents of pooling are more in error than its advocates, for while the latter exaggerate certain beneficial effects that would follow the co-working of rival lines, the former lay great stress upon a wholly non-existent danger. Surely, therefore, without attempting to discover just where between the two extremes of opinion the real truth lies, we can say, with perfect conservatism that pooling is, on the whole, a good thing and should be given a fair trial. Just how far it would in practice accomplish a reform of present evils it is impossible to say, but at least we may assert that its *tendency* would be to eliminate destructive competition in rates, to foster thereby the growth and development of our railway system, to abolish discriminations, to promote stability and publicity in rates, to check the movement toward railway

consolidation, to create a better feeling between the carriers and the public at large, and, by fostering interline harmony and allowing the form of co-operation chiefly desired by our carriers, to promote all phases of railway co-activity. When we further remember that the only serious objection ever urged against legalizing the pool is based upon a misconception of its results and does not in reality hold true, we cannot but wonder that pooling has so long been denied our carriers. Certainly it is not desirable that the present attitude of repression be continued.

§ 7. Despite the many advantages that seem to lie in legalization of pooling, it would be well in carrying out this needed reform to take every reasonable precaution to insure the absence of abuse. It is always possible that a measure free from theoretical objection will in practice have some undesirable features. This may be the case with legalization of railway pooling, and it is advisable, therefore, to adopt proper safeguards in advance.

To begin with, the commission should be given power, upon investigation of a complaint, to fix maximum and minimum rates, to issue and enforce general orders, and to do whatever else may be necessary with certainty to correct and prevent unreasonable charges. Evidently there would then be no further need to fear "extortion" from a pooling bill. Such a measure would then receive the hearty favor of the commission, and could hardly be objectionable to the thinking public. Assured of a just and reasonable tariff, there is no longer any cause to question either its origin or the way it is maintained. Our commission given effective control over rates the public seems to be fully protected against the one dreaded danger of legalized pooling.

To make assurance doubly sure, however,—to remove the possibility that even the most unexpected abuses could arise and continue from co-operation of competing lines,—it might be well to establish effectual control over the contents and

existence of all pooling contracts. The scheme proposed by Mr. Knapp seems to meet all the requirements in this respect. He suggests that pooling contracts be legalized under the following limitations:

1. That such contracts be filed with the commission and go into effect after a certain time has elapsed, unless previously opposed by said commission; in which case, the contract shall be invalid unless and until declared lawful by a designated tribunal upon appeal thereto.

2. That the commission have power to cancel a pooling agreement at any time upon due notice to the carriers concerned and after they have been heard on the question; and that, in case of such cancellation, the contract shall be and remain invalid unless and until declared lawful by a competent court upon appeal thereto.

With these provisions adequately enforced and the commission vested with real control over rates, there could be nothing to fear from the pool. Certainly therefore, in view of the more than probable benefits that would follow its legalization, it is to be hoped that before long, under the above safeguards, the fifth section of the Interstate Commerce Act will be repealed and pooling be declared lawful.

§ 8. On the whole, then, the railroads of the United States have carried co-operative endeavor into three great fields, in each of which the end sought has been for the welfare at once of the carriers and of the public at large. The universal establishment of through routes and through rates, the consolidation of freight classifications, and the restraint of direct interline competition, are all much to be desired; and in seeking to bring about these results, our railroads have tended to promote not alone their own best interests but also the greatest good of the community. The fact has not indeed been so fully recognized in regard to the co-operation of rival lines as for the other two features of railway coactivity; but it is, on that account, none the less true that the aims and

purposes of joint railway effort have in all three cases really fostered general welfare.

Yet, as we have seen, the present situation is not satisfactory. While there is no fault to be found with what our carriers have sought to do, much can be said of what they have failed to accomplish. There are still many cases where connecting lines refuse to "afford all reasonable, proper and equal facilities for the interchange of traffic;" freight classifications have not yet been unified; and agreements looking to a restraint of competition can be formed only in violation of the law. Evidently the present status of railway co-operation is not above criticism.

To remedy existing evils, a legislative enactment is in each case the best expedient. The co-operation of connecting lines should be make compulsory; the immediate formation by our carriers of a single freight classification should be assured,—as practically it would be,—by an effective threat of a classification prescribed by governmental authority; and the restraint of destructive competition should be inaugurated by legalization of pooling. If Congress were to carry out this program of reform, with the details already suggested, I cannot see but what the forms of interline co-operation existing in the United States would be in as satisfactory condition as we could hope, by government interference, to place them.

IV. A Railway Clearing-House.

§ 1. Before closing our discussion of railway co-operation, we should note briefly one other form thereof, which, while it has not in the past had any real development in the United States, is at least a probability and a desirable probability of the future. This form of co-operation is a railway clearing-house system.

An organization of our carriers to settle the receipts of different companies on joint through traffic by a system of balancing accounts, has been a long-felt need in this country. England established a railway clearing-house as early as 1842, and has continued thereunder to the present day. Indeed so clearly recognized were the benefits of this organization, that in 1850, it was chartered and its finding given a legal standing. To-day nearly every road in the United Kingdom is a member. In our own country, however, there has been no great effort to introduce among our railroads the clearing-house principle. True, the Southern Railway and Steamship Association was originally organized with this desirable feature, but unfortunately the experiment was discontinued, and to the best of my knowledge has not been repeated by any of our other traffic associations. In 1888, there seems indeed to have been some thought of organizing a clearing-house in the West, but the idea was never put into practice, probably because of the fact noted by Mr. Charles Francis Adams, that "it was at once characterized in the papers as a vast 'trust' . . . and denounced as a conspiracy."

§ 2. From the standpoint of railroad administration, there is to-day an obvious need of a clearing-house system. The enormous quantity and value of through traffic is such that the number of separate transactions between connecting lines is almost countless, the more so, as practically all our railroads are really more or less directly "connecting lines." Evidently, therefore, the mass and complexity of the settlements to be made,—on such questions as the apportionment of through traffic receipts, the liability for loss or damage, the proportionate share of each company in the general expense of the through service, and similar matters,—call for the formation of a clearing-house or a number of territorial clearing-houses in the United States. The time has certainly come when economy of management demands the erection of some such central organization to settle separate railway claims by

canceling mutual indebtedness and paying balances in checks or certificates. The present cumbrous and wasteful method of individual settlements between our carriers, has long been out of date and should be replaced by the more modern machinery so effective among banking institutions.

The advantages of a clearing-house system are not alone a question of the cheaper and more accurate settlement of inter-railway claims, however, but include also the maintenance of stable and non-discriminate rates. Suppose, for instance, an organization on the English basis, receiving all through traffic receipts, and then, after deducting from the returns of any one haul the clearing-house charges and the terminal expenses, dividing the balance on a mileage basis among the carriers participating in the haul. Evidently under such a plan, the administration of through traffic and the maintenance of published tariffs therein will lie, not with a number of separate roads, each anxious to swell its own receipts by drawing traffic from its neighboring rivals; but will be vested in a central organization of many roads and in a responsible head, whose business it is to see that every through consignment under given conditions is rated at just so much, neither more nor less. In this way we have the enforcement of non-discriminate charges, and obviously also, a strong tendency to keep rates stable. By preventing secret cutting, we at least make less likely its natural consequence of open warfare, and so reduce the probability of violent fluctuations in charges. On the whole, as Mr. Adams expresses it, "Nothing will tend more directly and immediately to raise the standard of commercial morality in railroad circles, than the organization of our railroads into some public and recognized clearing-house system through which the traffic management of the country can be taken out of the hands of irresponsible subordinates, who now so vilely abuse it, and restored to those who should be responsible, in fact as well as in name, for the companies of which they are the heads."

§ 3. These effects of a clearing-house are largely reactionary, however, for after all, such an organization is not alone productive of, but must be based upon, a strong spirit of unity among our carriers and upon such tangible results thereof as a common classification and a unified through tariff. Before we can hope to establish and maintain a clearing-house, therefore, we must secure a considerable degree of stability in charges, of conformity to published rates, and of other features that are not to be found under conditions of destructive competition.

This is really the secret of our never having developed a clearing-house. In the absence of any effectual restraint upon interline competition, our railway conditions have heretofore been too unstable to admit of the continued existence, much less of the successful working of such an organization. It is to the future, therefore, and to such promise as the future may hold of checking the destructive forms of interline rivalry, that we must look for the establishment of a clearing-house. When conditions are ripe for such a step,—when pooling is made lawful or rate-wars are in some other way eliminated,—then we may expect almost at once to see such an organization developed upon railway initiative. Direct government interference is neither necessary nor desirable, therefore, in this field of co-operation. From the mere legalization of pooling we may look for the organization of a clearing-house at the earliest expedient time. When it does come, however, then Congress should step in and at least give it recognition and encouragement, and perhaps make its decisions binding.

§ 4. In added emphasis, therefore, to what has already been said of the indirect effects of legalized pooling,—its tendency to foster general interline harmony and thus to promote through routing and uniform classification,—we must now add its probable tendency in like manner to develop a new and eminently desirable phase of co-operation,—the railway clearing-house.

Co-operation of competing lines has, therefore, not only been the great transportation problem of the past,—a problem in that its answer has never been determined to the general satisfaction of the community as a whole,—but evidently from an analysis of its nature and from a decision on the merits of the case, is the question to-day most in need of immediate practical solution. The emphasis laid upon pooling in the evolutional part of our subject, we must re-endorse for the "future." In the general field of railway co-operation, for its present defects, legalization of pooling is the most necessary remedy. Not only will such a measure directly promote general welfare by tending to abolish discriminations, increase stability, and check the movement toward consolidation; but it will also conduce toward the promotion of all other forms of railway co-operation. In concluding, therefore, we cannot avoid again voicing the hope that Congress will not long delay in giving favorable attention to a measure for the legalization,—under proper safeguards,—of railway pooling.

APPENDIX.

Traffic Associations.

Discussion taken from the Twelfth Annual Report (1898) of the Interstate Commerce Commission.

After referring briefly to the history of traffic associations, the commission discusses the organizations in the following language:

Almost all these combinations embodied the pool in one form or another as a part of the agreement. Indeed the pool was the vitalizing force, the sanction of the contract. The parties consented in effect that the association might fix the rate, and agreed to observe the rate so fixed, upon condition that each received a given proportion of traffic or a given proportion of earnings, no matter whether the traffic was actually carried or the amount actually earned.

It should be noticed, therefore, that prior to the passage of the act the railways had applied to the competitive railway business of the country the principle of railway combination for the making and maintenance of rates, incorporating as an essential part of that principle the pooling idea. It should be further noticed that the results thus obtained were by no means satisfactory. Rates were not stable. The grossest discriminations of all kinds existed, and rate wars were frequent. It was largely this condition, which the application of railway combinations had failed to cure, that induced the passage of the act.

The act prohibited the formation of pools. This prohibition, however, did not lessen the need for some common understanding as to competitive charges, but on the contrary that need was emphasized by the fact that all rates were required to be published. For the purpose of agreeing upon competitive rates most of the traffic associations then in existence were continued, the pooling provisions being omitted from their agreements and an attempt being made in most cases to supply the want of those provisions by a money penalty for breach of the agreement. In point of fact these associations in one form or another were perpetuated and they increased in number until, at the time the Trans-Missouri Case was decided, there were some nineteen of them in active operation.

When the Trans-Missouri decision was first announced the impression was sought to be created that all agreements between railways were thereby forbidden,

and that this must seriously interfere with the public convenience. But such a view has little foundation. Agreements having reference to the formation of through lines, the interchange of business, the use of cars, the keeping of mutual accounts, the making of uniform classifications, the establishment of whatever rules may be necessary for the handling of railway traffic, are not affected. Indeed, most of these matters never were within the purview of traffic associations. They belong rather to car-service associations, the Master Car Builders' Association, the Association of American Railway Accounting Officers, and many others of similar character, which are not believed to be in any way obnoxious to the anti-trust law.

The cardinal purpose of traffic associations is the restraint of competition between rival lines. This was the purpose which called them into being and formed the central idea of every such combination. An examination of the articles of agreement of the various associations as they existed before the Trans-Missouri decision will show that the object in every instance was in some form oı other to substitute the will of the association for the will of the individual member in the matter of the rate and whatever pertained to the rate. The association in effect made the rate, and each member was required to publish and maintain that rate.

Take as an illustration the Joint Traffic Association. That agreement was originally signed by thirty-two railroad companies, many of them the most powerful in America. The traffic controlled by it, generally speaking, was that from a point within to a point without, or from a point without to a point within, or which passed through New England, New York, Pennsylvania, New Jersey, Maryland, and a large portion of Virginia and West Virginia. It embraced the ports of Boston, New York, Philadelphia, and Baltimore, thus covering three-fourths of all the exports and practically all the imports of the United States.

The affairs of the association were managed by a board of nine members, from whose decision an appeal lay in the matter of rates to a board of control, and in other matters to a board of arbitration. The decision of these boards was final. Practically, as the Supreme Court held, no rate could be altered without the consent of the association. If the association named a rate, every member was virtually compelled to observe that rate. Manifestly, if the purposes of this association could have been carried out, its effect must have been to eliminate the factor of railway competition between its members in the matter of the rate as to all the traffic subject to its control. There might be and there would be other causes which would influence the rate, but this potent factor would be mainly removed.

As a matter of fact, the orders of this association in reference to rates, called recommendations in the agreement, were seldom enforced; for while the association was in all cases able to secure the publication of tariffs named by it, it was unable to secure the maintenance of those tariffs. Freight was habitually carried at less than the published tariff, and in making these cut rates each company acted independently and was therefore an independent competitor.

This feature of the case should be carefully noted in considering the advisability of the legislation sought by the railways. They are not simply asking of Congress

the right to form in the future the same kind of organizations as they were accustomed to form in the past, but to make contracts with each other which are illegal at common law independent of statutory prohibitions. It was this disability that deprived the joint traffic agreement of any real vitality and prevented its effective enforcement; and it is for this reason that no other traffic agreement has ever been enforced, except for a limited time and in a limited section. The want of legal sanction was always the inherent weakness of these combinations. If they agreed to anything which in terms effected an actual check upon rate competition they violated the law, and their contracts failed for lack of legal support; and if they did not in fact violate the law, it was because their contracts in this respect were so elastic or unimportant as to have no practical value. Therefore, in spite of every effort to restrain competition by agreements between railways, that competition was all the while active and potent because the agreements themselves were not legally enforceable.

The right is now asked to make agreements of this sort which shall be enforceable, and the effect of these associations when legal can not be accurately estimated by their effect when illegal. Whether, even with legislative sanction, railways can and will make and enforce such contracts between themselves is a matter of much doubt, but in determining whether they should be given the privilege it must be assumed that they can and will. It must be assumed that the Joint Traffic Association, for instance, would in fact exercise the power which it possessed during its existence only in theory.

It is important, therefore, to bear in mind that the relief sought by the railways is much more than exemption from the anti-trust law or repeal of the anti-pooling section of the act. The demand for legislation is not primarily occasioned by those laws or by the construction given them by the courts. When the Trans-Missouri Case was decided it was said that demoralization of railway rates would immediately ensue. But it is difficult to see that any marked change has resulted from that decision.

Rate wars often happened before that case, and there were frequent departures from and fluctuations in the published tariffs. The situation has certainly not improved, but neither does it seem noticeably worse than it was before. Following this decision, traffic associations generally dissolved or materially modified the scope of their activities. So far as we are aware, the Joint Traffic Association was the only one that continued its former functions and claimed the sanction of validity. While this attitude was maintained there was apparently no reason why the restraint of its agreement should be affected by the Trans-Missouri Case. Yet it may be fairly doubted whether during the interval between the Trans-Missouri decision and the Joint Traffic decision there was any section of the country where the abuses which that association was intended to correct were more flagrant than in the very territory covered by its operations. The real question, therefore, is not whether the railroads shall be relieved from the effect of these decisions, but whether they shall be granted a right of contract which they never possessed.

The carriers insist that agreements of this sort ought to be permitted and that the business of transportation cannot be conducted in accordance with the

inter-state commerce law unless this is done. They allege various reasons for this contention. Among the most prominent are the following, which it may be instructive to restate here:

In order to be stable, rates on competitive traffic must be uniform by all lines, or at least equalized by agreed differentials or other similar concessions. This is a self-evident proposition, but it may not be generally understood how slight a difference in rate will effect a diversion of traffic. It was asserted at a recent hearing before the commission that a difference of one-eighth of a cent a bushel in the freight rate between Chicago and Liverpool determined the route which grain would take. The same thing would be true between Chicago and New York. There are certain kinds of freight the movement of which may be influenced to a considerable extent by facilities, but with reference to most classes of dead freight the rate is the controlling factor.

It is alleged, in the second place, that the interests of different lines of transportation, different localities, and different commodities can not be properly adjusted, so that rates shall be reasonable and non-discriminatory within the terms of the act, without the power to confer, discuss, and determine by mutual agreement what the rate shall be.

There is great force in this claim. The freight rate is a complex problem when applied to almost all competitive traffic. Very few people not acquainted with the subject have any idea how difficult the solution of that problem is. Rates between points which to a superficial observer have no connection are often in fact interdependent. The rate from New York to New Orleans by water may control the rate from Chicago to St. Louis by rail. In fixing particular rates the claims of different transportation lines, different markets, and different commodities all have to be considered and offset one against another.

It is extremely difficult to see how carriers can intelligently adjust their rates so as to fulfill the general requirements of the act without the right to organize in some form for the purpose of obtaining necessary information and applying that information as occasion requires. To one familiar with actual conditions it seems practically out of the question to establish rates that are relatively just without conference and agreement. But when rates have once been established, the act itself requires that they shall be observed until changes are announced in the manner provided. Certainly it ought not to be unlawful for carriers to confer and agree for the purpose of doing what the law enjoins.

A railroad is essentially a monopoly. This is literally true as to all local points upon its line which are reached by it alone. It is only at competitive points—that is, at points where traffic can be carried by two or more lines—that the railroads become actual competitors. It results from this fact that as a rule competitive points gain at the expense of noncompetitive points. Competition forces down the rate where it operates, and either leaves the rate unaffected or induces its advance at noncompetitive points to make good the reduction at competitive points. The natural result of railway competition, it may be fairly said, is to create preferences between localities.

The same thing is true of preferences between individuals. One person is so located that his business must of necessity pass over a particular line of railway; another person can avail himself of either one of two or more lines. Naturally the latter obtains the better rate. Considered *a priori*, therefore, we should expect that railway competition would produce preferences and discriminations between communities and between persons. What might to a large extent be expected has actually occurred beyond all legitimate excuse.

One of the outcomes of these railway abuses was the act to regulate commerce. The purpose of that act was largely to do away with preferences and discriminations. It also aimed to keep alive competition between railways by prohibiting pooling arrangements. In other words, it endeavored to eradicate the results and to perpetuate the cause. Many people insisted at the time the act was passed that these two purposes were inconsistent and could not stand together.

The act provides for the publication by the carriers of their tariffs for the transportation of persons and property, and that requirement has been almost universally complied with. If it be admitted that these published tariffs, with certain important exceptions, are in the main free from those obnoxious features which the law was intended to prevent, and that, as a general rule, the published rates are reasonable and not seriously discriminative, except when the long and short haul rule is disregarded, nevertheless it is true that a great part of the competitive railway business at the present time is not done upon the published tariffs, but upon secret rates, which are less than those specified. It results, therefore, that while discriminations and preferences have been ostensibly removed, or at least diminished, they still exist in a most aggravated form. The railways insist that they always must exist and that the provisions of the act in this respect can not be made effective unless they have the power to combine and thereby control the competition which provokes these violations of law.

The act also provides that the rate shall in all cases be adhered to, and that departure from that rate shall constitute a criminal offence. The corporation itself is not, under the law as interpreted by the courts, amenable to the penalty, but the individual who acts for the corporation is. Apparently, therefore, when the rate has once been determined and published the business of the railway manager is extremely simple. It consists merely in charging every person that published rate. If the open rate on grain from Chicago to New York is 20 cents per hundred pounds, it is difficult for one not acquainted with the business to understand why a railway should transport wheat for 15 cents per hundred pounds between those points. The railway manager insists, however, that this must be done in some cases, and that under existing conditions he frequently cannot get traffic without making such concessions. It may be well to consider for a moment what the situation is from his point of view.

A railroad is constructed in a particular place and can only be used in that place. It is intended to transport certain traffic and is only available for the transportation of that traffic. Its roadway, stations, rolling stock, and office force must be maintained, whether the business done in a given year is large or

small, at substantially the same expense, and this constitutes the greater part of the entire outlay. The actual cost of moving the traffic is usually very much less than the amount received. Within certain limits, therefore, it is good policy for the railway manager to increase his tonnage, even at the expense of reducing the rate per ton. Just how far this rule applies no one can tell. The merchant who buys an article for a definite price knows when he sells it whether he makes or loses by the transaction; and the manufacturer, as a rule, has a pretty accurate idea of the cost of production, but the railroad operator cannot ordinarily say whether he should or should not as a matter of good policy take traffic at a certain price. Generally speaking, he feels that he must have the traffic. His road is there and it can be used for nothing else. The property with which he stands charged may be seriously injured without that particular traffic, and he must get it when it is moving. He cannot lie idle for better prices or more prosperous conditions.

There is, therefore, a constant temptation to obtain it at any cost. Now, the rates between two competitive points have been published. The manager of one road finds that business has abandoned his line, and he believes that it is moving by a rival route. He can draw but one inference, and that is that his competitor has secretly reduced the rate. Under these circumstances what shall he do? Shall he maintain the published rate and thereby abandon the business? But that means disaster to his road, the loss of his reputation as a manager, and ultimately of his employment. What most managers actually do is to get the business by making whatever rate is necessary.

It has sometimes been said that the secret rate should be met by a published rate; but this is not always practicable as the law now stands. A notice of three days is required to effect a lawful reduction in tariff charges; and before the rate can be legally reduced by one road, a still lower secret rate may be offered by a rival road. In many cases a secret rate can be successfully met by an open rate only when the latter is far below any secret cut and far below any compensatory basis. This is not competition but warfare, disastrous alike to the railway and the public.

The shipper, of course, assiduously cultivates the impression that lower rates obtain upon a rival road. Indeed, it is said that large shippers have actually diverted their entire traffic from a particular line for the purpose of convincing that line that better rates could be obtained elsewhere, and thereby extorting from it a reduced rate as the price of restoring a portion or all of their business.

The commission does not intimate that the above causes justify the alleged results, nor concede for a moment that it is impossible for a carrier to maintain its published rates. It is perfectly clear that the observance of tariff rates is entirely within the power of the railway managers themselves, and it is equally clear that such a course would be vastly to the advantage of the railways as a whole. It must, however, be admitted that it would be difficult and often ruinous for a given railway to maintain rates so long as its competitor made secret concessions. It must furthermore be admitted that whether justified or not the results are substantially as claimed by the carriers.

We are satisfied from investigations conducted during the past year and referred to in another portion of this report, as well as from information which is perfectly convincing to a moral intent, that a large part of the business at the present time is transacted upon illegal rates. Indeed, so general has this rule become that in certain quarters the exaction of the published rate is the exception. From this two things naturally and frequently result. First, gross discriminations between individuals and gross preferences between localities; and these discriminations and preferences are almost always in favor of the strong and against the weak. There is probably no one thing to-day which does so much to force out the small operator, and to build up those trusts and monopolies against which law and public opinion alike beat in vain, as discrimination in freight rates. Second, the business of railroad transportation is carried on to a very large extent in conceded violations of law. Men who in every other respect are reputable citizens are guilty of acts which, if the statute law of the land were enforced, would subject them to fine or imprisonment. This is true both of the traffic operator and the shipper. It is difficult to estimate the moral effect of such a condition of things upon a great section of the community, and almost impossible to believe that it can be allowed to continue without some attempt at reformation.

This condition the present law is powerless to control. If it is asked why the criminal remedies are not applied, the answer is that they have been, and without success. The most earnest efforts have been made by the commission and by prosecuting officers in various parts of the United States to punish infractions of this law. While some fines have been imposed, no substantial effect has been produced. It is plain to the commission that satisfactory results cannot be obtained from this course. The difficulties in the way of securing legal evidence necessary to a conviction are such as to be in most cases insurmountable. The fact may be morally certain, but the name, the date, the amount cannot be shown with the particularity and certainty required by the criminal law. While some of the difficulties of obtaining convictions might be removed by suitable amendment, we are convinced that criminal remedies as applied to the present situation are utterly inadequate to prevent departures from published rates.

The logical way to remove these evils would be to remove their cause. If unrestricted competition produces discrimination, one obvious way to prevent such discrimination is to restrict competition. Just how far existing conditions would be improved by legalizing combinations would depend upon the extent to which such agreements were made and actually enforced among the carriers. This in turn would depend largely upon the temper of railroad managers. The results which attended similar agreements previous to the passage of the act were not such as to hold out hopes of complete success. Moreover, such agreements must be voluntary and if any one line of considerable importance refuses to participate the whole attempt might come to naught.

But it is claimed that hitherto such contracts were not legally enforceable; that railroad managers did not realize ten years ago as they do now the disastrous consequences of competition; and that if the government should now authorize the formation of railway associations and traffic agreements and thereby restrain in

some degree railway competition, we might expect as a result the establishment and maintenance of uniform and equitable rates.

As above stated, many thoughtful persons contended, when the act to regulate commerce was passed, that unrestricted competition was inconsistent with the purposes aimed at by that act. We are inclined to think that this view is correct, and that time has demonstrated the futility of attempting by criminal enactments to secure absence of discrimination in railway rates so long as independent ownership and unrestrained competition exist. We are inclined to think that competition should be restricted; but if the railroads are allowed to agree for that purpose, such conditions should be imposed as will fully protect the public interest.

While railway transportation in this country is carried on by private capital, it is essentially a government function. This appears from the necessary conditions of railroad construction. It is a universal maxim that private property cannot be taken for private uses, but only for the public use. Yet no railroad can be built without the appropriation of private property. It equally appears from the relation of the carrier's business to the community. A merchant may sell to one customer for one price and to another customer for another price, as best subserves his interest, without violating any sense of right and wrong, but it is to-day universally felt that the rates of public transportation should be uniform to all. As we have already said, the railway is, from its very nature, in respect to the greater part of its business, a virtual monopoly. The essential feature of a government function or of a monopoly is that it excludes the idea of competition, and this notion prevails in almost every civilized country to-day. So far as we can obtain information, there is no great nation at the present time which endeavors to enforce competition between its railways, although in many cases that method has been tried and abandoned.

But if the business of transportation is essentially a government function, then the government must see that it is properly discharged. If it is in essence a monopoly, then it must be regulated. The two things of necessity go hand in hand. Just as no other great nation to-day enforces competition between railways, so there is no other great nation to-day which does not regulate and control the railway rate. If this country is to change its theory of railway regulation, it should adopt the new theory in its entirety. The carriers ask that they be allowed to combine with each other to fix and maintain reasonable rates. But who shall decide what rates are reasonable? Is that to be left to the carriers who fix their own rates, or should the people who grant this extraordinary privilege reserve to themselves the right to determine that question? It does not necessarily follow, therefore, that permission should be given to make these combinations. The evils attendant upon restricting competition might be greater than the benefits derived from it. The rate should be reasonable as well as stable and uniform, and hitherto competition has been mainly relied upon for that purpose. It is said that railway rates are lower in the United States than in any other part of the world. This may not be exactly true; but to whatever extent it is true, it is largely due to railway competition. Now, if this competition is to be removed, what is to take the place of it?

Our conclusion in reference to agreements of this sort, and the degree of control over rates which should be exercised by public authority, is substantially as announced in our last annual report. The two propositions are closely identified in principle and properly go together. The railroad situation in respect to the maintenance of rates is conceded to be deplorable, and the experience of eleven years has shown that the present law is wholly inadequate to deal with that situation. As to this, the commission has no specific remedy to suggest which would not involve resort to measures of so radical a nature as would doubtless preclude their adoption. We are of the opinion that, to avoid the discriminations and grievous inequalities now existing, the government must ultimately, in some form or other, assume such measure of control over railroad rates and management as will restrict excessive competition and insure to all shippers, large and small, rich and poor, strong and weak, the same rights and privileges in everything pertaining to railway service. The carriers ask for authority to try the remedy of legalized co-operation. If they are permitted to do so, then ample safeguards against abuse should also be provided.

The commission indicated in its last annual report the amendments which in its judgment are needful to confer upon it the requisite power over rates. Those amendments would not invest the commission with any different or greater authority than it was long supposed to possess; they would simply enable it to carry out the purposes of the act as declared in its first three sections. We are still of the opinion that public authority should be endowed with that measure of regulative control over the railways of this country, and if the commission is not qualified to discharge that trust then a more competent tribunal should be created.

If traffic agreements which will have the effect to restrain competition are to be permitted, then, in order to insure uniformity and equality as well as reasonableness of rates and for the better protection of the public, two or three general observations should be borne in mind :

1. The experiment can not be fairly tested by limited and insufficient measures. The proposition is to correct the present abuses which result from competition by restricting the competition itself, and unless the restraint is effectual the result will not follow. Such attempts have failed of their purpose in the past because agreements of this nature were not enforceable. To permit only a limited and feeble restraint would be to doom the experiment to failure before it was tried. On the other hand, and in view of the objections to the policy proposed, it might be well to provide that such a law should expire after a certain number of years by its own limitation. It may be urged with great force that it is much easier to limit the duration than to secure the repeal of a measure of this character, and that if such a law were once placed upon the statute books it would be difficult to get rid of it, no matter how disappointing or obnoxious might be its effect. A time limit sufficiently long to fairly test the experiment would remove this apprehension.

2. The contract itself and everything done under the contract should be open to public inspection. The very fact that a great combination works in secret

often produces the impression that something is wrong and sometimes actually occasions the wrong.

3. We believe it would be to the advantage both of the public and the railways if the public had some voice or some representation in organizations of the kind under consideration. Taking the Joint Traffic Association as a model—and that probably represents the best railway thought upon the subject—if the public appointed one or more of the board of managers, who would be unbiased and impartial in its deliberations, to whom the shipper would feel free to submit his complaint, and who would bring the shipper's views to the attention of the association, it might do much to promote just conduct and harmonious relations between the railways and the public, and thus prove mutually beneficial to a high degree. If this is a practical suggestion it may deserve to be included in such a scheme of legislation.

Whatever view may be taken of this phase of the subject, the necessity for a thorough revision of the act can not be overstated. The principles of this law as set forth in its first three sections are conceded to be sound and beneficent, but at present they amount to little more than the declaration of a sentiment. Some of the minor features of the statute are fairly sufficient, but the machinery for enforcing its substantive provisions is fatally defective. Every consideration of private justice and public welfare demands that railway rates should be reasonable, uniform to all shippers, and equitable between all communities. Until needful legislation is supplied that demand must remain unsatisfied and the commission must continue to rest under the responsibility of a duty which it is powerless to discharge

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